Electric Hose and Rubber Company *and* United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC. Cases 17-CA-9205, 17-CA-9511, and 17-RC-8966

June 15, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 4, 1981, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding and, on June 5, 1981, she issued an Errata to that Decision. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a limited exception, requesting an expanded remedy.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt her recommended Order, as modified.

The Administrative Law Judge found that Respondent had committed numerous violations of Section 8(a)(1) in this proceeding and that certain of those violations, along with other actions, also constituted objectionable conduct warranting the setting aside of the election held herein and the directing of a second election. We agree with all those findings except for the Administrative Law Judge's finding of a violation in Respondent's February 1980 discontinuance of certain overtime, and a violation in the January 1980 modification of medical insurance.

1. The Administrative Law Judge found that Respondent violated the Act in February 1980 by terminating its program permitting employees to earn overtime pay by reporting to their work stations 15 to 20 minutes before the commencement of a shift. During that "early-in" period, employees prepared to take over the running machine, without shutting it down, from the earlier employee shift. Respondent instituted the early-in overtime program in the fall of 1979 for the purpose of increasing the machines' productivity by eliminating gaps in production. Respondent contended that it eliminated the early-in overtime in February because customer orders had so declined as to require a significant decrease in production. In support of its claim, Respondent submitted its projections for expected production between September 1979 through September 1980. In specific, Respondent placed in evidence the 12 separate "three month production status plans" which Respondent prepared each month reflecting the next 3 months' production. Respondent indicated that, in mid-January 1980,

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

Respondent in its brief asserts that, with respect to several issues in the instant case, the Administrative Law Judge was predisposed to believe the General Counsel's case, and to credit his witnesses, and predisposed to discredit Respondent's witnesses, and thus she failed to consider impartially the record evidence as a whole. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that any predisposition to a particular position existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "Total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, our examination of the record convinces us that the Administrative Law Judge's factual findings are supported by a preponderance of the evidence.

We do, however, correct the following inadvertent omissions or errors in her Decision. (1) The Administrative Law Judge's "Statement of the Case" failed to note that the election here was held on March 6, 1980. (2) Contrary to the Administrative Law Judge's finding, the conversation between Supervisor Welsh and employee Lorimer, which is set out at sec. III,B,2, par. 20, of her Decision, was, in fact, alleged in the complaint, at par. 6(g), as a violation of the Act. (3) Contrary to the Administrative Law Judge's indication at fn. 71 of her Decision, employee Darwin Scott did testify in this proceeding, as the Administrative Law Judge herself noted in the text accompanying fn. 38 of her Decision. However, the Administrative Law Judge was correct to the extent that Scott did not testify concerning the issues involved at fn. 71 of her Decision. (4) At sec. III,B,8, par. 2, of the Decision, we note that O'Dea was informing Guthrie of certain action O'Dea might take. (5) At Appendix A, par. 16, of her Decision, the precise transcription is "We could shut down a plant entirely which would be an extremely drastic . . . fring [sic], from deep layoffs today." [Appendix A omitted from publication.] (6) At sec. III,B,10, par. 4, of her Decision, the reference to "Young" should read "Welsh." None of these inadvertent errors warrant disagreement with any of the Administrative Law Judge's findings on the issues they involve.

In finding that Respondent had unlawfully threatened plant closure and had stressed the futility of unionization to its employees, the Administrative Law Judge relied, in part, on certain testimony of employee Jack Sabin detailing comments by Respondent's Vice President Kinsland. The Administrative Law Judge credited Sabin's account because she found that Kinsland did not deny the statements or attempt to explain or modify them. The record reflects, however, that Kinsland did deny the statements. Accordingly, as the lack of a denial was the primary basis for crediting Sabin's testimony, we put no reliance on that testimony about Kinsland's comments. However, we still conclude the record supports the Administrative Law Judge's findings of the violations at issue.

With respect to the plant closure allegation, we note that at sec. III,B,3,b, par. 2, of her Decision, the Administrative Law Judge indicated that Plant Manager Bauer made a statement at the September 1979 meeting about hating "to see the plant go down the tubes." However, that statement appears to have been made by Bauer at a February 1980 meeting. Contrary to Respondent, however, we do not think the Administrative Law Judge used this erroneous finding to "shore up" her crediting employee Prochazka, who had indicated that Bauer had made a comment in a September 1979 meeting about the plant's closing if the Union came in. Prochazka's comment relates primarily to what another supervisor, Tom Torre, said at the September meeting, and Torre's comments on the point stand uncontroverted.

based on projections for February–April, it eliminated inventory overtime and reduced Saturday overtime. These actions are not alleged as unfair labor practices. Then, in mid-February 1980, based on the projections for March–May, which indicated continuing decreased production needs, Respondent alleges that it eliminated the early-in overtime. It notes that continuous operations of the machinery, which required the early-in overtime, resulted in increased production, yet its projections showed a need to decrease production, which Respondent attempted to do by shutting down the machinery, thereby obviating any need for early-in overtime.

The accuracy of Respondent's documents as projections of its production needs has not been put in question. Although these documents reflect a substantial dimunition of production projections over the stated period, the Administrative Law Judge found them unpersuasive because they were not probative of actual production. And, since Respondent allegedly had actual production figures available, the Administrative Law Judge drew an adverse inference from the failure to submit them. Noting the myriad other unfair labor practices found, the Administrative Law Judge concluded Respondent's defense was pretextual and that union considerations had motivated the elimination of early-in overtime.

We cannot agree with the Administrative Law Judge that to support its contention that reduced orders warranted elimination of early-in overtime Respondent in this proceeding had to submit evidence of its actual production experience during the relevant period. Although evidence of actual experience may have been helpful, we find that Respondent's projections, the information on which it based its decision to eliminate the program, are probative of Respondent's motivation and it was then the General Counsel's burden to demonstrate that these figures were, in fact, not relied on by Respondent in making its decision to eliminate early-in overtime. This burden the General Counsel did not carry. Further, in light of the admission of such probative evidence, we cannot give weight to certain employee testimony that the overtime program was more economical to Respondent than a plan permitting machine shutdown between shifts. As Respondent's evidence reflects significant decreases in projected production around the time of Respondent's elimination of early-in overtime, and as there is no evidence to refute its assertion that the projection of this lowered production caused the elimination of early-in overtime, we conclude that legitimate business reasons motivated Respondent's conduct. Accordingly, we reverse the Administrative Law Judge's finding that by eliminating the early-in overtime program Respondent violated the Act.

2. The Administrative Law Judge found that Respondent's January 1980 modification of its employee medical insurance, while not alleged as an unfair labor practice in the complaint, had been fully litigated and constituted an additional violation of Section 8(a)(1). We are satisfied, however, that this allegation arose in the hearing as an objection to the election, presented by the Charging Party. Respondent asserts that because the modification was made before the election petition was filed, and hence was outside the critical period, and because it had been led to believe that the matter was raised solely in the context of an objection, it put on no evidence regarding this action. Respondent's argument appears to have merit and, in such circumstances, we do not think this issue can be said to have been fully litigated. Hence, we reverse the Administrative Law Judge's finding that this incident constituted a violation of Section 8(a)(1) of the Act.[2]

3. Based on the various findings of the Administrative Law Judge, we shall direct that a second election be held at a time deemed suitable by the Regional Director.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Electric Hose and Rubber Company, McCook, Ne-

[2] Respondent raises a similar argument that its February 1980 change in medical insurance administrators was alleged only as an objection to the election and that the Administrative Law Judge was therefore in error in finding it fully litigated as an unfair labor practice. It is clear, however, that, unlike the medical insurance coverage issue, Respondent cannot contend that it refrained from presenting evidence on this allegation. Indeed, the record is clear that this issue was fully litigated and hence was properly found to violate Sec. 8(a)(1).

[3] The Charging Party has requested that Respondent be ordered to announce "the ultimate settlement of these unfair labor practice charges" in the local newspaper, the McCook, Nebraska "Daily Gazette." The Administrative Law Judge found as a meritorious objection to the election a newspaper ad that Respondent had placed in the local paper. That ad, however, was not alleged as an unfair labor practice. We are satisfied that our usual remedies will adequately rectify the unfair labor practices and objectionable conduct undertaken by Respondent in this proceeding. See, e.g., *Eastern Maine Medical Center*, 253 NLRB 224, 228 (1980); cf., *F.W.I.L. Lundy Bros. Restaurant, Inc.*, 248 NLRB 415, 416 (1980).

In adopting the Administrative Law Judge's recommendation to direct a second election we do not adopt any implication that *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), held that issuance of a bargaining order is not possible absent a card majority. See *Conair Corporation*, 261 NLRB No. 178 (1982); see also *United Super Markets, Inc.*, 261 NLRB No. 179 (1982).

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

braska, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Delete paragraph 1(i) and reletter the subsequent paragraph accordingly.

2. Delete paragraph 2(a) and (b), substitute the following for paragraph 2(a), and reletter subsequent paragraphs accordingly:

"(a) Make whole any employees who may have suffered loss of pay resulting from the unlawful delay, if any, in granting scheduled wage increases."

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held on March 6, 1980, in Case 17-RC-8966 be, and the same hereby is, set aside, and that Case 17-RC-8966 be, and the same hereby is, severed from Cases 17-CA-9205 and 17-CA-9511 and remanded to the Regional Director for Region 17 for the purpose of conducting a new election.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with these rights. More specifically:

WE WILL NOT coercively interrogate our employees regarding their union activities and sympathies and the union activities and sympathies of fellow employees.

WE WILL NOT withhold, or tell our employees that we will withhold, scheduled wage increases because the Union filed a representation petition.

WE WILL NOT threaten employees with plant closure, layoff, and loss of other benefits if they select the Union as their collective-bargaining representative.

WE WILL NOT announce to employees the futility of selecting the Union as their collective-bargaining representative and conveying to them the impression that union representation inevitably brings uncompetitiveness, strikes, loss of jobs, lower wage increases, and other dire consequences.

WE WILL NOT solicit grievances from employees with the implied or express promise that they will be remedied without a union.

WE WILL NOT promise or grant benefits or improvements in terms and working conditions or announce such benefits or improvements to employees in order to discourage them from supporting United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, or any other labor organization.

WE WILL NOT inform employees that they cannot transfer to another plant because they supported the Union.

WE WILL NOT unlawfully solicit employees to withdraw their union authorization cards.

WE WILL NOT promulgate and discriminatorily enforce a rule which prohibits employees from displaying union insignias and other material demonstrative of support for the Union or other labor organization in and about their work stations.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in the Act.

WE WILL make the employees whole for any loss of earnings or other benefits suffered as a result of our delay, if any, in granting scheduled wage increases.

ELECTRIC HOSE AND RUBBER COMPANY

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: A hearing was held in this consolidated proceeding at McCook, Nebraska, on September 23 through 26, 1980,[1] pursuant to a consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 7 on April 24, as amended on May 16 and September 8.[2] In addition, on April 25, the Regional Direc-

[1] All dates herein refer to 1980 unless otherwise indicated.

[2] Further modifications of the allegations contained in the amended complaint were made by counsel for General Counsel at the hearing.

tor ordered consolidated certain issues arising from a representation election in Case 17-RC-8966. The complaint, based upon charges filed by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (herein called the Union), alleges that Electric Hose and Rubber Company (herein called the Company or Respondent), has engaged in 11 separate violations of Section 8(a)(1) of the National Labor Relations Act, as amended.

The Union's representation petition was filed on February 1, 1980, and sought a representation election among certain of Respondent's production and maintenance employees. An election was held pursuant to a stipulation for certification upon consent election approved by the Acting Regional Director for Region 17 on February 1. Objections to conduct affecting the outcome of the election were filed by the Union on March 7, 1980.[3]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company on November 28 and December 1, respectively.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Delaware corporation engaged in the manufacture of rubber and plastic hoses at various locations, including a facility located at McCook, Nebraska. It further admits that during the past year, in the course and conduct of its business, it has purchased goods and materials valued in excess of $50,000 directly from sources located outside the State of Nebraska and annually sells goods and services valued in excess of $50,000 directly to customers located outside the State of Nebraska. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company, a division of Dayco Corporation, operates five manufacturing plants.[4] Additionally, Dayco has approximately 50 other plants, including facilities located overseas.[5]

The union organizing campaign commenced on or about August 20, 1979, when Bob G. Long, a field representative for the Union, in response to a telephone call from Leonard O'Dea, met with a group of 12 to 15 employees who immediately joined the organizing committee and commenced the campaign.[6]

Respondent admits that the following individuals were supervisors at material times:

Bill Bauer	Plant Manager
Dave Collins	Foreman
Lee Guthrie	Foreman
Carlton Holt	President
Gordon Kinsland	Vice Pres. of Mfg
Rod Koetter	Foreman
Phyllis Kotschwar	Floor Lady
John Modrell	Foreman
Gary Pevoteaux	Foreman
William Sitzman	Production Mgr./ Asst. Plant Mgr
George Ward	Foreman
Willie Welsh	Foreman
Jim Wright	Industrial Relations Mgr.

B. *Alleged Violations of Section 8(a)(1)*

1. Interrogations

The complaint, as amended, alleges that five separate interrogations occurred between September 5, 1979, and March 8.

a. It is asserted that, on or about September 5, 1979, William Sitzman, during a conversation with Clyde Swartz,[7] inquired "how the union campaign was going?" Swartz replied that he did not know. Sitzman then asked "How is the card signing going?" Again Swartz replied that he did not know. At that point, the conversation was terminated becauae another employee, Mary Coomber, sought information from Sitzman about vacations. Sitzman denies ever discussing the union campaign with Swartz.

The complaint further asserts that on or about March 8, Ronda Weber[8] was at a local night spot[9] with her

[3] According to the tally of ballots served on the parties the day of the election, which has not been challenged, of approximately 375 eligible voters 114 cast their ballots in favor of and 248 cast their ballots against representation by the Union.

[4] In addition to the McCook plant, the other divisional facilities are located at: Alliance, Nebraska; Olney, Texas; Ocala, Florida; and Dover, New Jersey. The Electric Hose and Rubber Division is headquartered at Ocala, Florida, where it has just opened a new facility. The Dover, New Jersey, plant, which does business under the name National Hose, is the only operation within the division represented by the Union.

[5] As herein pertinent, three plants operated by Dayco are the Waynesville, North Carolina, and Springfield, Missouri, plants, and a plant in Compton, California, owned by Allied Industries, which is also a subsidiary of Dayco.

[6] According to Long, whose testimony is not disputed, the production department contained the heaviest concentration of support for the Union. Some of the employees Long mentioned as strong union supporters were Leonard O'Dea, Red Griffing, Mike and Nadia Schoup, Mark Prochazka, Marty Cantrall, Lester Randolph, Jim Helberg, and Cameron Martin.

[7] Swartz, a current employee, has worked for Respondent about 4-1/2 years as an inspector bailer.

[8] Weber, at the time of the hearing, had been employed by Respondent for a little over 1 year and was currently working in the reinforcement department.

[9] The Hitching Post Bar and Grill, Culbertson, Nebraska.

parents and Mr. and Mrs. Sitzman, when Sitzman, who was playing pool with Weber's father, approached her and inquired "how many authorization cards we had signed." Weber then testified: "I told him I did not know. Then he asked me how many unfair labor practices we had against the company and I told him I did not have that either. And then he goes, 'Well, it did not matter how many we had. They can appeal them up to three years.'" Sitzman then returned to the game of pool. Sitzman testified that he does not recall being at the Hitching Post Bar and Grill on March 8 at the same time as Weber and her parents. He did recall being at the Bar and Grill with Weber and her parents on some unspecific date, but he averred he never discussed the Union with her there, never asked her how many union cards had been signed, never asked her how many unfair labor practice charges had been filed, and never told her about the Company being able to tie up the "unfair labor practices" for years.

Based on the demeanor of Weber and Swartz and the criteria established in *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1976),[10] which are utilized throughout this Decision, their testimony is credited.[11]

c. Mike Schoup[12] stated that on or about September 25, 1979, his supervisor, Koetter, came to his work station accompanied by a man who was temporarily to relieve Schoup. According to Schoup:

> We went up to the industrial engineer's office. Him and I were the only ones present.
>
> We walked in and he told me my attitude had been getting bad lately and he said it had been since the union thing had started out. He then asked me if I had been going to any of the union meetings, at which time I told him he had broken the law and he should change the subject.
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> He then said, "I don't care how you vote." Then he changed it and said, "I do care how you vote, It's your business, but if the union gets in the company will blame the foremen."

Koetter did not testify, no reason for his absence was advanced at the hearing, and Respondent did not address this allegation in its breif. The uncontroverted testimony of Schoup is therefore credited.

d. Rick Brown stated that he had a conversation with his supervisor, Gary Pevoteaux, in the presence of Rick Simmets[13] immediately after he received his paycheck. During September and October 1979, Respondent attached to the employees' paychecks a slip which stated; "Take a good look at this," and had a space marked for union dues which would have been deducted if the Union became the employees' representative and payroll deduction of dues was authorized.[14] Brown was reviewing this attachment to his paycheck when Pevoteaux came up and asked, "Are you union radicals?" Brown replied, "I would rather not say." Pevoteaux then turned around and walked off.

Respondent argues that Brown's testimony should not be credited for he initially testified that the conversation occurred December 10, then stated it occurred in September, and finally stated it occurred in October. The confusion was initially occasioned by counsel for the General Counsel asking leading questions which stated that the conversation occurred on December 10, 1979. The witness corrected himself later in his testimony. Therefore, the confusion of dates does not warrant, in this circumstance, discrediting the testimony of Brown. Gary Pevoteaux did not testify; he was no longer employed by Respondent nor did he live in McCook. Respondent did not state when Pevoteaux ceased working for Respondent, or where he resided at the time of hearing. He could have resided close to McCook. There was, therefore, no clear showing that Pevoteaux was unavailable. Accordingly, Brown's uncontroverted testimony is credited.

e. Marc Prochazka[15] testified that on March 6 his supervisor at the time, John Modrell, came up to him as he and Kevin Root[16] were cleaning the machines prior to voting, and said, "I'm going to dismiss you guys to go vote . . . . Oh, by the way, Marc, have you made up your mind how you are going to vote yet? You've been kind of indecisive for the last few months." Prochazka said he replied, "Yes, John six months ago." Modrell then left the area.

Modrell testified that, while at Prochazka's work station, "He [Prochazka] asked me, or told me, excuse me, that he had some questions on the campaign, various things in it. . . . I asked him if he had any questions that I could answer. . . . He said 'no'. . . . I asked him if he would like to talk to Dave Otey,[17] he was there, and that he could maybe answer his questions for him . . . . [Prochazka] said he would like to talk to him." Later that evening, Modrell contacted Otey and "had him go talk to him." Otey did not testify and there is no indica-

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[10] The Board observed, page 235: ". . . it is abundantly clear that the ultimate choice also rests on the weight of the evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record, and, in sum, all the other variant factors which the trier of fact must consider in reaching credibility."

[11] Although the testimony of conversations with Lester Randolph by McFarland and Doreen Parsons, some of which are discussed below, are not claimed by the General Counsel to be unlawful interrogations, it is noted that only the conversations with McFarland were recalled by Sitzman as containing any reference to the Union and/or the organizing campaign. Sitzman's testimony is found to reflect an unclear recollection of the events.

[12] Schoup is a current employee. He has worked for Respondent in the production department about 3 years.

[13] Simmets did not testify.

[14] There was no allegation that the attachment to the employees' pay stubs was violative of the Act. It is noted, however, that the attachment also made reference to lost wages, hard feelings, strikes, fines, and the attachment, dated October 12, 1979, also stated: "YOUR PAYCHECK HAS NO DEDUCTION FOR UNION DUES OR ASSESSMENTS. KEEP IT THAT WAY! REMEMBER SIGNING THAT UNION CARD IS LIKE SIGNING A BLANK CHECK. YOU NEVER KNOW WHAT KIND OF TROUBLE IT CAN CAUSE!"

[15] Prochazka is a current employee assigned to the production department.

[16] Root did not testify.

[17] Otey was an employee who worked for Respondent at the Dover, Delaware, facility and had previously given a talk at a series of employer-called meetings where he detailed some of his dissatisfaction with the Union. Otey's statements were not alleged to be violative of the Act, and the matter was not fully and fairly tried.

tion Prochazka did talk to Otey. Modrell denies asking the questions and making the statements Prochazka attributed to him. Respondent asserts that Prochazka's testimony should not be credited because he exhibited pique at counsel for Respondent during cross-examination and, "Furthermore, until the Judge asked him to remove it, the witness wore a cap drawn down over his eyes while testifying."

Modrell did not recall what time he talked to Prochazka on March 6, but did admit he talked to him more than once. The content of the other conversations was not mentioned. Considering Prochazka's status as an employee, the time of the conversation, the lack of refutation by Otey, and considering the other previously described criteria, Prochazka's testimony regarding this allegation is credited.

Discussion

In determining whether interviews or interrogations are coercive, the Board, in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enforcement denied on other grounds 344 F.2d 617 (8th Cir. 1965), set forth the following criteria:

> Despite the inherent danger of coercion therein, the Board and courts have held that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability. The purpose which the Board and courts have held legitimate are of two types: the verification of a union's claimed majority status to determine whether recognition should be extended, involved in the preceding discussion, and the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case.

In allowing an employee the privilege of ascertaining the necessary facts from employees in these given circumstances, the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

In evaluating the conversations herein, it is clear that neither verification of claimed majority status nor the investigation of facts regarding a complaint in preparation for the Employer's defense was involved, and Respondent never claimed such involvement. Neither were the established safeguards observed to minimize the coercive impact of employer interrogation and the atmosphere was not free from company hostility to the organizing effort.

The interrogations made during a union organizing campaign were comprised of inquiries into the progress of card signing, how an employee is going to vote after informing the employee that an adverse change in his attitude had been noted by the supervisor since the union organizing campaign began, asking employees if they are union radicals, inquiring how many unfair labor practices the Union "had" against the Company and stating that the Company can appeal any matters regarding them "up to three years," thereby inferring that the filing of charges would be ineffective against the Company, at least during the organizing campaign, and inquiring how an employee was going to vote immediately after releasing that individual to vote, were not shown to be necessary or privileged inquiries, isolated instances, or technical violations.[18]

The test for "interference," "restraint," or "coercion" does not turn on the subjective impact which the inquiries may have on the individual employee.[19] Rather, the question is whether it can be reasonably said that the employer's conduct tends to interfere with the free exercise of employee rights under the Act. *Litton Dental Products Division of Litton Industrial Products, Inc.*, 221 NLRB 700 (1975). There appeared to be no legitimate purpose for asking the questions, nor were the employees given assurances against reprisals. Moreover, when considered in connection with the existing atmosphere of the Company's campaign against the Union, that the incidents were not isolated, and considering the other activities discussed hereinafter, I find such interrogations and statements to be inherently coercive and in violation of Section 8(a)(1) of the Act. *San Lorenzo Lumber Company*, 238 NLRB 1421 (1978).

That some of these inquiries were addressed to well-known union supporters, even if it is assumed that threats of reprisal or promises of benefits are absent, does not abrogate or mitigate the violations, and such interrogations are unlawful and in violation of Section 8(a)(1) of the Act. See *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980), and *Edgcomb*

[18] While the complaint does not allege that Respondent engaged in any other unlawful interrogations, several other instances where spervisors questioned employees were mentioned on the record. These matters were not, through amendments, added to the complaint, or sufficiently handled on the record to permit a finding that they were fully and fairly tried. Hence, they are treated as background material. Accordingly, it is further noted that Sitzman and Modrell independently asked Douglas Winder what he thought of an antiunion meeting held by the Company. Jack Lorimer's uncontroverted testimony is that, on March 5, a supervisor named Willie Welsh inquired if he thought the Union would get in. Max Burton testified, without refutation, that on or about February 28 his supervisor, Pevoteaux, asked him about the union organizing campaign and what he thought of the Company's antiunion meeting. Burton heard Pevoteaux ask Rod Cluff what he thought of the meeting and how he was going to vote. Jack Sabin testified, without refutation, that his supervisor, David Collins, said, "He said he was kind of embarrassed, but he had a question to ask me. . . . How do you feel about the Union? . . . I had to ask because I've been told to ask all my people and the other foremen will be asking their people too."

[19] There was no evidence of impact introduced at the hearing.

Metal Co., One of the Williams Companies, 254 NLRB 1085 (1980).

2. Alleged threats of layoff and refusal to transfer prounion employees

The General Counsel alleges in the complaint that Respondent made several threats of layoffs if the employees voted for the Union.

a. *February 27 and 28*

As part of the Company's antiunion campaign, it held a series of approximately 13 meetings with approximately 20 to 30 employees attending each meeting. Apparently employee attendance was compulsory. Present for the Company at all the meetings were Wright, Kinsland, and Bauer.[20]

According to Douglas Winder, who worked the 11 p.m. to 7 a.m. shift, he attended a meeting, with about 20 other employees, conducted by Kinsland at or about midnight on or about February 27. At the end of the meeting, Kinsland said that "if the union was in the plant at the present time with the lack of orders, the company was in [sic], they would be forced to lay off, I believe, 62 people. . . . He said that if the company didn't do it the first time, the union would fight them every time after that."

Kinsland believes that there were 13 meetings with groups of employees. According to Kinsland, he discussed the economic recession in general, how it affected Dayco and its subsidiary, Electric Hose & Rubber División, and, in particular, how it affected the McCook plant. Kinsland stated his presentation varied "some" from group to group. The presentations were said to have generally included the following matters: that Dayco was coming off a record year, they made a lot of money; however, the first quarter of 1979 had indicated a softening in business, particularly in the automobile market; that the second quarter looked really bad for all of Dayco; that the divisions of Dayco dependent upon the auto industry were the hardest hit; he stated that the Olney, Texas, plant had gone from a 3-shift operation to 1-1/2 or 2 shifts per day, running about 40 to 45 percent of capacity; and that the Alliance, Nebraska, plant was running full but he could see a softening, that they had a large backlog of orders.

Also mentioned by Kinsland was that the Dover, New Jersey, plant was in the process of laying off 64 people: "We had to lay off when economics dictated, we had to hire when economics dictated because we were under contract, I told the people that if we had not laid off we would have lost our right, probably, to lay off at the next downturn because we would have set a precedent."

Kinsland also discussed the economic situation at the McCook plant, discussing the "cost saving programs that Bauer and his . . . employee committees had instituted to try to reduce overhead, reduce scrap, just take all the fat out, and I told the people that at the last step, the last thing we wanted to do was have a layoffs [sic], but I could not guarantee that there would be no layoffs." He also mentioned that the recession looked like it would "go pretty deep" and that everyone had to participate in "belt-tightening to weather the economic downturn." Jim Wright substantiated Kinsland's testimony. Wright also talked at the meeting about contract negotiations and contracts. The contents of his presentation will be discussed below.

Kinsland specifically denies telling the employees that, if the Union came in, the Company would be forced to lay off 62 employees. He also denies saying that, if they did not lay off the employees, then the Union would fight the Company every time they wanted to lay off employees in the future. He did make a statement to that effect about the Dover plant but not about the McCook plant. However, he did admit that the issue of extra people[21] did come up during the meetings.

The February 27 meeting was one of two company meetings where Bauer discussed the financial condition of the Company. Another meeting where that subject was discussed occurred in January. The General Counsel specifically offered the testimony of Prochazka about the January meeting conducted by Bauer as background information only. According to Prochazka, "Bauer did most of the speaking. Most of the meeting was about the authorization cards for the union and what it basically was, was their opinion of what the union cards represented. They also spoke of what would happen in the plant if a union came in. . . . They said the plant could be closed down. Tom Torre made mention of that fact. He said we could be laid off at that time." Winder, in his testimony, recalled the January meeting conducted by Bauer but did not mention any threats to lay off employees or to close the plant being made at that meeting.

On February 28, after leaving one of these meetings, according to O'Dea, Sitzman inquired what he thought of the meeting. O'Dea replied that he thought it was "a bunch of bull" and that they were just trying to use scare tactics. Sitzman said that "it was not bull, it's for real. We have 75 machines in our wardwell area and it wouldn't surprise me a bit if no more than 25 of them would be running by the end of the week." O'Dea did not state what he characterized as "a bunch of bull." Sitzman's testimony did not refer to this conversation. Although this conversation was specifically alleged to be a violation of the Act, the General Counsel's brief does not mention it. Due to the paucity of evidence adduced on this allegation and counsel for General Counsel's failure to pursue the issue in his brief, this issue will be considered abandoned, and it is recommended that the allegation be dismissed.

According to Bauer, he conducted approximately 15 meetings on January 2 and 4. He characterized them as general meetings where he discussed the growth of the plant since it opened in 1971, listed the employees that had the longest tenure with the Company, and compared benefits between 1971 and 1980. The presentation also included mention of the general overall good condition of the plant, how well it was doing, and that the only cloud on the horizon was that of the economy. It is claimed that a lack of orders was first mentioned in December

[20] Wright also conducted meetings on February 25.

[21] The term "Extra people" was defined as having more people than needed to keep the equipment running.

1979 but it is not stated whether such information was relayed to the employees during these meetings or whether December was normally a slow month for orders.

On March 3, Doreen Sabin[22] asserts she saw Wright going from work station to work station chatting with employees. When he came to her work station, "he assured me that there was nothing personal in the campaign, and he said that if all we had was 100 unfair labor practices against him, then he hadn't done his job very well." That same day, Gordon Kinsland also came by her work station: ". . . Gordon assured me that there was nothing personal in the campaign, and that when it was all over, he still loved me and that economically it would be better for him if the union got in because the first thing they would do is lay off 62 people and then begin negotiations."

Kinsland admitted having two or three conversations with Doreen Sabin but could not recall specifically the content of the conversations. However, he uncategorically denied stating to her that economically it would be better for him and the Company if the Union came in; they could first lay off 62 people and then begin bargaining. Also, Kinsland denies ever mentioning to anyone that, if the Union came in, he would lay off 62 people.

The next incident mentioned in the complaint occurred on or about March 5 when, it is alleged, Kinsland, during a conversation with Lester Randolph, Max Burton, and James Helberg, stated that, if the Union came into the plant, Respondent would lay off 62 employees.

Max Burton testified that while working during the evening of March 3, at approximately 2:30 a.m., he observed Kinsland talking to Lester Randolph:

> And when I approached they were discussing if the Union was to come into the plant, he [Kinsland] said that 62 people would be laid off for "economical" reasons to keep the plant going and to keep their products on the same profit level. And after that, Lester asked about transferring to Ocala, Florida. And Kinsland said that—and he [Kinsland] pointed at his [Randolph's] union button—"For that reason, he [Kinsland] would be a fool to send him [Randolph] to Ocala." He [Kinsland] said that if he [Randolph] was not in the union activities he [Kinsland] would have considered it.

Burton was sure it was Kinsland, not Wright, who made the comment. Even though he initially told the Board the supervisor was Kinsland, he changed the identification to Wright, claiming he changed his view the day he gave his affidavit. Burton admitted talking to Randolph about his testimony even though the sequestration rule was invoked.[23]

Randolph testified that he was present at an employee meeting on March 3 which was conducted by Wright, Bauer, and Kinsland, wherein the company representatives discussed the constitution of the URW as well as layoffs and fines.[24] That same day he saw Kinsland talking to Jim Helberg. Burton was also standing there. During the conversation, which he believed occurred about 1:30 or 2 a.m., Kinsland said if the Union did come in there would be 62 workers laid off.

The following evening, Randolph overheard Helberg ask Kinsland if he could transfer to Ocala, Florida. Kinsland said "to Jim Helberg that being that he was active in the URW that he would not allow him to do it. I [Randolph], in turn asked Kinsland, right back, if I could transfer. He [Kinsland] stated to me, no, because I had a URW button on and he said that, the night before if I would have left the button off that he would allow me to transfer and beings that I put the button back on,[25] he [Kinsland] wouldn't allow me to go. . . . and if I was to apply for an application for the Ocala plant he would deny it, because I had something to do with the URW here in McCook, Nebraska."

On March 5, Helberg claims he saw Kinsland walking around the plant and, as he walked by, Helberg asked if he could transfer to the Ocala, Florida, plant. Kinsland replied that he could not transfer Helberg for he had a union button on "they did not need any radicals running around down there." Helberg[26] confirmed Randolph's statement that during a meeting Randolph threw off "his union button." Randolph later asked Kinsland if he could transfer to Ocala, Florida, and "He told Lester [Randolph] he could have been hired down there, but since he put that button back on, he wouldn't do it to them." Kinsland also "said if the union did get in it would be a good ideal because the way the economy was at that time, he said we could just lay off 62 people and it wouldn't be any problem." According to Helberg, Burton was also present for a portion of the conversation but was not sure if Burton walked up to them at the beginning or at the end of the conversation.

In addition to denying that he made any statements about laying off 62 employees at McCook, Kinsland denies that he refused employee transfers to Ocala, Florida, based on their support for the Union. According to Kinsland, Burton asked to talk to him, he never talked to Burton. He did talk to Randolph about the Ocala, Florida, plant in the presence of Burton and Helberg. Randolph inquired about the possibility of a transfer. "I told Mr. Randolph that it wasn't our policy to transfer people except in the supervisory or technically key personnel areas, that we didn't transfer hourly or easily trained po-

[22] Sabin quit employment with Respondent in July.

[23] According to Burton, he asked Randolph "how it went" after Randolph testified. Randolph said: "Well, hey, they really tore me up . . . . he did not think that he got what he wanted to say across." Burton also indicated that Randolph gave him an idea of the questions he was asked.

[24] Several witnesses, in uncontroverted testimony, stated that the Company's representatives discussed a union fining an individual named Sofie Coates obstensibly because she crossed a picket line. This discussion is considered pertinent to the overall climate at the plant during the union organizing campaign and in considering the objections to election where union fines and other potential adverse effects of union representation are considered.

[25] At the meeting the prior evening, Randolph said he had removed his union button, throwing it to the ground.

[26] Helberg has worked for the Company apparently 3 years and is currently employed as a rubber cover operator.

sition employees." Randolph was also informed that the policy also applied to quality control operators. Burton or Helberg—he cannot remember which—then commented: "something to the effect, 'Well, you wouldn't take me there anyway because of this union badge.'" Kinsland cannot recall any futher conversation with any of the three above-named employees and specifically denies telling Helberg he could not transfer to Ocala for any reason.

Lorimer, in unrefuted testimony, stated that he had a conversation with Willie Welsh, a supervisor, on March 5, wherein:

> He asked me what I thought or what I knew and I said, "Oh, I know the union is going to get in." He said, "No, it ain't." I said, "Yes, it is." And we just went on talking there. I cannot remember all of it. He said, "You had better hope it don't." And I said, "Why?"
>
> He said, "Well, your area will be the first to be moved out." And he kind of turned around and started to leave and turned back around and said, "You got your chain saw sharpened,[27] Jack?" And I said, "Yes,"—I said, "No." He said, "Then you had better get it sharpened." I said, "Why?" He said, "You might be needing it."

There was no objection to this testimony even though the complaint did not contain an allegation that this statement was violative of the Act. Also considering that Respondent had adequate opportunity to address this contention, it will be considered on its merits.

On March 4, Respondent's president, Carlton Holt, participated in an employee meeting that one of the employees[28] tape-recorded. A transcription of the recording was introduced into evidence and is attached hereto as Appendix A. [Appendix A omitted form publication.] During the speech, Mr. Holt, who did not testify, mentioned the possibility of layoffs, which the Company was attempting to avoid or minimize. He then indicated that the economic well-being of the Company is directly related to customer confidence, which, he asserted, a union undermines. Holt also stated that a "no" vote for the Union informs the Company that the employees are willing to work with the Company to "whip the problems facing us. And you will say that you have confidence that we will do what's right for you in these inflationary times. And I wish I could elaborate on that, but I can't. . . it's against the law."

b. *Respondent's position*

The Company argues that Kinsland's testimony should be credited. It is claimed that: only Douglas Winder, of all the employees attending the meetings, testified that such a statement was made at the session he attended; his testimony varied from his affidavit; and, when he was interviewed by Respondent's counsel, he was unsure of the number of employees the Company was going to lay off, but it could have been 33, not 62 as he testified, his testimony should not be credited. Respondent further argues that the other employees' testimony which contradicted Kinsland's should not be credited. Helberg testified that the conversation with Kinsland occurred on a different day than Burton's and Randolph's. Also they differed as to how long each was present.[29] Helberg admitted that he walked away from the conversation and, hence, did not recall any statement regarding layoffs.[30] Burton was not sure whether Kinsland or Wright made the alleged statements. Randolph did discuss his testimony with Burton contrary to an admonishment not to discuss his testimony. Doreen Sabin testified about one matter[31] based on hearsay which, it is argued, demonstrates a proven tendency to testify about things without having knowledge of them.

That several current employees testified that Kinsland mentioned at various times the possibility of laying off the same or similar numbers of employees in the event the Union won the election during a week of intense campaigning where, admittedly, the recession had forced the layoff of employees at the Dover plant, and the fact that the Dover plant was represented by the Union was mentioned as one of the considerations is admitted, as well as Holt's speech, lead me to credit the employees' testimony.

Discussion

Section 8(a)(1) of the Act prohibits an employer from interfering with, threatening, or coercing employees in the exercise of their Section 7 rights to support or oppose a labor organization, or to engage in or refrain from engaging in concerted activity. This prohibition is tempered by the provisions of Section 8(c) of the Act, which states:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Supreme Court, in *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 617–619 (1969), balances the requirements of the two above-stated sections of the Act as follows:

> Any assessment of the precise scope of employer expression, of course, must be made in a context of its labor relations setting. Thus, an employee's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because

[27] As a sideline, Lorimer "cuts trees," to supplement his income.

[28] Vicky Knight.

[29] Kinsland acknowledged that all three employees were present.

[30] Contrary to Respondent's argument, Helberg's admission is demonstrative of candor.

[31] The testimony related to the posting of a notice which, on cross-examination, she admitted she heard from another employee.

of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. . . .

[An employer] may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, eventuality of closing is capable of proof." 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisals to be taken solely on his own volition. *N.L.R.B.* v. *River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

Accordingly, Respondent's statements will be examined in the "context of its labor relations setting."

During the 2 weeks before the election, speeches were delivered to nearly the entire work force at meetings called by the employer and, apparently, mandatorily attended by the employees. The director of manufacturing for Dayco, who is also vice president of manufacturing for Electric Hose and Rubber, Gordon Kinsland,[32] discussed a lack of orders and indicated that the election of the Union as the employees' bargaining representative could result in layoffs of a substantial number of employees. The president of the Company, Holt, 2 days before the election, stated that a failure to vote was almost like a vote for the Union. "Don't sit on the sidelines and let somebody else decide your future and your job . . . your no vote will say that you are for the future of the plant."

The record is devoid of evidence that unionization would result in increased costs. There was not even a statement of record or otherwise of good faith belief that unionization would increase costs.[33] No comparisons between the employees' current wage scale compared to the Union's prevailing wage scale were made nor were any comparisons of union to nonunion benefits proffered.

During a meeting conducted shortly before the election, Respondent admittedly discussed the potential need for layoffs in the future while conducting a meeting expressly designed to defeat the Union's organizing effort and, during one series of these meetings, the Company's president clearly indicated that a vote against the Union was a vote for the Company, a factor that was to be considered in how the Company reacted during its asserted economic difficulties. These comments were reinforced by a statement made outside the meeting setting by Sitzman to O'Dea and Kinsland as statements to several employees, Randolph, Sabin, Burton, and Helberg, most of whom are current employees, and whose testimony I credit based on their demonstrated sincerity, the heretofore mentioned criteria including admissions that the subject of layoffs was discussed, the contextual consistency of the witnesses' allegations, and the fact that the management's speeches were demonstrated to be statements which greatly impressed these employees. Therefore, it is concluded that the Employer's statements as to the possible consequences of unionization were not clearly shown to be outside the Company's control but, rather, raised the potential of economic reprisal through Respondent's own volition in response to the Union's organizing campaign; all of which is found to be violative of Section 8(a)(1) of the Act.

The Respondent's argument that Kinsland did not speak with Helberg or Burton regarding the potential of either employee transferring to Ocala, Florida, is based on the assertion that only Kinsland's testimony should be credited. Kinsland admitted that all three employees were present throughout most of the conversation, that the potential for transfer to Ocala was discussed, and that the overt demonstration of support for the Union was mentioned a basis for denying transfer, albeit by another employee. Kinsland never claimed he disputed the alleged statement of adverse consideration due to union support.

The testimony of the employees' notwithstanding some confusion and conflict, is credited where their testimony contradicts Kinsland, based on demeanor and the fact that the reference to the union button clearly left a strong impression upon the employees, whose recollections of the events are credited. That the Company allegedly had a policy against transferring hourly employees from one plant to another was not corroborated.

The denial of a transfer because the Employer did not want a union activist in a new facility, and because prounion employees will not be accorded the right to transfer, is found to be a violation of Section 8(a)(1) of the Act. *National Southwire Aluminum*, 247 NLRB 1315 (1980).

[32] Also present were Bill Bauer, the McCook plant manager, and Jim Wright, the director of industrial relations for Electric Hose and Rubber Company.

[33] In fact, while describing to the employees how negotiations were conducted, Respondent circulated at these meetings a contract from a company located in Excelsior Springs, Missouri. The union representing those employees is unknown. Respondent used this contract to indicate that, when employees were represented by a union, the bargaining process is not a guarantee of improved benefits. The Excelsior Springs contract was utilized to illustrate how a union could agree to benefits which were less than the McCook employees were receiving.

3. Alleged threats of plant closure

a. *Company notices and signs*

The complaint alleges that, on or about February 18, Respondent's personnel director, Tom Torre,[34] posted red and white notices around the plant. The notices read: "YOU CAN LIVE WITHOUT THE UNION. CAN YOU LIVE WITHOUT THE HOSE PLANT."

David Corey[35] testified that he saw Tom Torre post two notices, one by the door leading to the timeclock and the other "around the corner of the mill." Corey stated that he talked to Torre as he was posting the notices about other matters.[36]

Sandy Corey,[37] the wife of David Corey, saw the same poster by a women's restroom. The witness initially indicated, in response to a leading question, that she saw Tom Torre posting the notice. However, on cross-examination, she stated that she learned the identity of the individual posting the sign from a discussion, not from personal knowledge.

Darwin Scott[38] testified that he observed the sign on various bulletin boards and saw Tom Torre posting the material.

On February 18, 1980, Doreen Sabin observed several of the posters placed throughout the plant and said she knew the Company posted the signs because she was so informed by her husband.

Leonard O'Dea saw the notice posted at several places in the plant and one was hanging in the tube area up until 2 or 3 weeks prior to the hearing in this proceeding.

Joy Arendell,[39] a current employee of Respondent who has worked for the Company about 8 years, stated that the sign was her idea; she had the sign printed at her own expense, and she posted the notices all over the plant. Arendell admitted she had friends who also posted signs around the plant but asserted that she did not give them to any supervisors. She avers that the idea for the posters came to her during one of the company-conducted meetings when some prounion employees booed Bill Bauer during a speech. Arendell stated she wanted to do something. According to Arendell, the posters were taken down after she put them up by a person or persons unknown. She did not state when the posters were taken down. In addition to the posters, she also had stickers with the same message printed at the same time. These stickers were also posted. According to Arendell, no stickers are currently posted, but she has one just laying at her work station. She saw union stickers everywhere around the plant and discussed this with Darryl Brown, her supervisor at the time, who said there was nothing she could do about them. She said she removed some stickers and threw them in the trash. Arendell asserted that she did not see any supervisors removing union or her own posters.[40]

Tom Torre was not employed by Respondent at the time of hearing. He was, however, residing within McCook and Respondent was given an opportunity to subpoena him or present any and all reasons why he could not be called as a witness. Respondent did not avail itself of this opportunity. The failure of Respondent to subpoena Torre and the unrefuted testimony that Torre was seen posting the notice lead to the conclusion that a supervisor actively posted a missive inferring that a vote for the Union would lead to plant closure. It could be argued that Torre's actions were not within the scope of his employment. As the Board stated in *J. S. Abercrombie Company*, 83 NLRB 524 at 529 (1949), enfd. 180 F.2d 578 (5th Cir. 1950):

> The test applied by the Board, with the approval of the courts, in determining whether an employer is responsible for coercive statements by a supervisor is not whether the statements were, in fact, within the scope of the supervisor's employment, but whether the employees have just cause to believe that the supervisor is acting for and on behalf of management in the situation under dispute. Under this test, the Board and the courts have held that, in the absence of special circumstances . . . an employer is responsible for coercive statements and other conduct of a supervisor. [Citing *Matter of Peter Freund Knitting Mills*, 61 NLRB 118, 123 (found to be supervising employees for they were held out to be representatives of management to the employees and were reasonable regarded by employees as representatives); *Matter of Columbian Carbon Co.*, 79 NLRB 62, 63 (lack of retraction or any action specifically repudiating supervisor's remarks); *N.L.R.B.* v. *Link Belt Co.*, 311 U.S. 584, 599 (failure to repudiate, subsequent discharges) *International Association of Machinists* v. *N.L.R.B.*, 311 U.S. 72, 80 (where the employee would have just cause to believe the actions of supervisor were for and on behalf of the management); *N.L.R.B.* v. *Schaefer-Hitchcock*, 131 F.2d 1004, 1007 (C.A. 9) (supervisory status reported as sufficient to be regarded as representing the attitude of management); *N.L.R.B.* v. *Cities Service Oil Co.*, 129 F.2d 933, 935 (C.A. 2) (comments made by individuals who exercised general authority over the employees and were on a strategic position to translate to their subordinates the policies and desires of the management).]

In this proceeding, attribution of Torre's conduct to the Company is clearly justified. There was no showing that the material was ordered removed and the inference raised in the posting disavowed. In fact, Avendell, at the

[34] Respondent would not stipulate that Torre was a supervisor but, based on Bauer's testimony that Torre had the authority to hire, fire, and effectively recommend discharge, it is concluded that Torre was a supervisor as defined in the Act.

[35] Corey is currently employed by Respondent as a forklift driver and has worked for the Company 4 years.

[36] Corey's affidavit did not mention the poster. The witness explained the absence of this subject due to the failure of the Board agent to mention it.

[37] Sandy Corey, a current employee of Respondent, has worked at the plant for approximately 2 years.

[38] Scott is presently employed by the Company.

[39] Arendell, at the time of the hearing, worked as an inspector.

[40] The issue of removal of union or other insignia is discussed below. Kinsland said he saw the stickers, but did not order anyone to take them down.

time of hearing, still displayed a sticker at her work station and O'Dea saw a poster shortly before the hearing.

b. *Background*

Another factor supporting this attribution of Employer responsibility is the overall history of violations as detailed herein. Also, as background,[41] counsel for the General Counsel introduced unrefuted evidence that Bauer,[42] on or about September 13, 1979, conducted a meeting wherein union authorization cards were the primary subject discussed. According to Prochazka, Bauer and Torre "also spoke of what would happen in the plant if a union came in . . . . They said the plant could be closed down. Tom Torre made mention of that fact. He said we could be laid off at that time."[43]

Bauer recalled conducting a meeting with employees in Sepember 1979 where "URW" authorization cards were discussed and that if they signed the cards they were effectively signing over their representation rights to the Union, that it was like signing a blank check. After reviewing his speech,[44] he acknowledged that he did say he would hate to see the plant go down the tubes.

Also during this September meeting, after likening the signing of the authorization cards to the signing of a blank check,[45] Bauer bet the employees a cup of coffee that, once they signed an authorization card, they could not get it back.[46]

Another incident not specifically alleged as a threat of plant closure was addressed in the testimony of Jack Sabin.[47] According to Sabin, in response to a question from an employee to the effect that "if the union was so bad, how come Respondent didn't close up the union plants they had," Kinsland said: "Lately the union and the company have been getting along a lot better, but that they were building a plant in the South [Ocala, Florida] and when they get in full production, they would have to reevaluate that plant in Waynesville, union plant in Waynesville, and Springfield and see how it stood there because they were going to have to do something." Kinsland did not deny making this statement or change the purport given by Sabin to his comments by explaining or modifying the statement. Holt's statements, cojoined with Kinsland's, clearly demonstrate a pattern of making managerial decisions regarding plant closure and layoffs to the employees' representational status.

The General Counsel alleges that, on March 4, Holt stated in a speech that a yes vote for the Union would mean that the McCook plant would wilt and die. As previously indicated, a transcription of Holt's speech is appended hereto. [Omitted from publication.][48] It should be noted that O'Dea's testimony that Holt told the employees:

> . . . the economy was bad, that this was the worst time for the company to have labor problems, for a union to be trying to come in. He said that orders were slow in the industry and if things didn't pick up that they could possibly have layoffs, possbile plant closure. This was things that they didn't like to talk about, didn't like to see. He said that the yes vote in the election on March 6 could mean that the McCook plant could wither and die on the vine. He said that a no vote on March 6 would be a vote of confidence in the company and continued progress and prosperity. . . .

was quite accurate and supportive of the determination that his testimony is credible.

d. *Respondent's position*

The company argues that Joy Arendell's testimony should be credited. Even if her testimony is credited, Arendell admitted she did not post all the signs, ad the employees who testified they saw Torre post the signs are note refuted in any testimony.[49] Respondent's argument regarding Holt's speech is that the possibility of plant closure was mentioned in connection with a discussion of the economic straits Respondent was experiencing.

Discussion

The statements made by Respondent's representatives are subject to the balancing requirements previously quoted from the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., et al., supra*. Considering the totality of the Respondent's behavior including the notices and the

[41] Inasmuch as counsel for the General Counsel specifically limited this evidence "as background," no finding on the merits regarding the incident is warranted.

[42] Torre assisted Bauer in conducting this meeting.

[43] As previously mentioned, Torre was not called as a witness nor did Respondent avail itself of the opportunity to demonstrate that he was unavailable to appear as a witness.

[44] Initially, he testified he could not recall if he said during the speech he would hate to see the plant go down the tubes.

[45] It is noted this allegation was repeated in the material appended to the employees' pay slips.

[46] Whether the bet is a violation of the Act is discussed below.

[47] Again, this matter was not contained in the complaint nor was the complaint amended to include this unrefuted material. Since Respondent did not address this testimony in its evidence after the Company specifically requested counsel for the General Counsel to specify if material not alleged in the complaint was later included, this testimony is also considered only as background material. As the Board held in *Pandair Freight, Inc.*, 253 NLRB 973 (1980), admissible background evidence is probative of a "party's attitude toward its responsibilities and obligations under the Act and to clarify events."

[48] On the last page of the transcript, Holt, after describing a downturn in orders occasioned by recessing economics, described the dangers of unions and strikes, and stated:

> *Your no vote will say that you are for the future of this plant.* It will say that you want to work in harmony to pull together to continue making this plant a good place to work. To be proud of . . . a place with a solid future. You are now and you have been in the past, making a contribution to the growth of this plant. And you've brought it to the state that it enjoys today. Your no vote will say that you intend to continue in these efforts and that . . . that will keep this plant growing instead of wilting on the vine. [Emphasis supplied.]

[49] Respondent also argues that Prochazka's testimony, treated as background evidence, should not be credited because other employees who attended the same meeting did not similarly testify. If corroboration were a prerequisite to credibility, Arendell's testimony should be similarly discredited, since not one of her "friends," who also assertedly posted the signs, testified. As previously mentioned, the failure to call Torre is unexplained. Finally, Bauer did admit saying he "would hate to see the plant go down the tubes."

speeches,[50] the subject of plant closure was not "carefully phrased in the body of objective fact to convey the employer's relief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in the event of unionization." *Gissel, supra*. See also *Patsy Bee, Inc.*, 249 NLRB 976 (1980). Both the sign posting by Torre and Holt's speech strongly inferred that any decision regarding plant closure was dependent upon the employees demonstrating support for the Company by defeating the Union's representational bid. It is clear that Holt's speech equated union support with disloyalty. See *Oscar Enterprises, Inc.*, 214 NLRB 823 (1974). As previously indicated, there was no showing that unionization would result in an increased economic burden creating a precedent or other basis for the predictions. Also considered is the timing of Holt's speech, immediately prior to the election. The Holt speech clearly inferred to the employees that, in the Company's view, a union would inevitably bring about strikes, loss of jobs, loss of customers and plant closure. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

4. Allegations involving wage increases

General Counsel alleges that Respondent's industrial relations manager, Jim Wright, and Kinsland told employees at a company-called meeting that Respondent had scheduled pay increases for January and April, but was not able to give these raises because of the ongoing union activity. Additionally, it is alleged that Respondent threatened to withhold wage increases because of the pending negotiations.

According to Jacqueline R. Shepherd,[51] she attended the meetings conducted by the Company. At the second meeting, Kinsland was the main speaker, talking primarily about "Dayco economics." Kinsland explained that negotiations could be quite lengthy, "with a lot of give and take." He said that Dayco had not backed down from a union, and it would not do so in the future. A question was asked of Kinsland "if it was true that we were due a raise but hadn't received it.[52] . . . and he told her that things like that were not allowed while there was a union campaign going on."

Shepherd's testimony was corroborated by Ronda Weber, who testified that, on February 29, Wright discussed a contract, admittedly an agreement of a different employer, and then requested the employees to ask questions. One employee asked when the next raise would occur and Wright or Bauer replied that raises had been scheduled for January and April. "[H]e said they [the employees] would get them if the union campaign had not been going on at the time." That Weber attributed the statement to Wright does not discredit her testimony. Respondent had conducted a series of meetings and variances in testimony could be attributed to the witnesses' attendance at different meetings.[53] Shepherd also testified that Wright described negotiations, saying that they were, at times, long drawn-out affairs, and some negotiations, he had been involved in, "that you could not, if the Union were to go in and say they wanted several things, that you could not always count on getting all of these things. You might get one, but you would have to possibly give up two or three."

Max Burton testified that:

> Wright said that the company had a scheduled pay increase for January and April and was not able to give it because of the union activities going on. They also said that there was a pay increase that the union had filed charges against because they had given a pay increase during a union campaign. They also then reviewed the union constitution. They said that if a person was in a bar and having a drink with another union member and this person said something false about a union officer that that a person could be fined. And if the second person did not report this conversation that he could be fined also, then went on about if the union were to come into the plant, there would be a much more violent atmosphere. They said that—they mentioned strikes in other plants that had unions and that the violence that they had had . . . . They said that all negotiations would start at minimum wage and for everything that the employee gained in the negotiations that they would take something in return, for instance benefits, medical insurance, whatever.[54]

Jack Sabin testified that during a February 25 company-held meeting, which approximately 25 employees attended, Wright discussed the Union's constitution. During the discussion, Wright assertedly informed the employees about union dues and fines and mentioned the Sofie Coates case.[55]

> He [Wright] said that if we brought a union in and we went down to negotiations, would we be willing to give up maybe our vacation and our insurance, because he said he would probably be the negotiator and the company negotiates tough with the union on a union contract. He said that when you start to negotiate, you start from scratch and then go from there and not to let the union rep tell you that you begin negotiations from where you're at in respect to wages and benefits.

[50] Also considered are the other unfair labor practices found herein.

[51] A current employee who has worked for the past 4-1/2 years as a hydrotester.

[52] She believed the questioner was Betty Undemaier. Undemaier did not testify.

[53] Respondent did not place in evidence lists of employees indicating the workers attending each meeting.

[54] The General Counsel did not allege that the statements about strikes and union fines, which were subjects included in the testimony of a number of the General Counsel's witnesses, were of such a nature as to constitute additional violations of the Act. Inasmuch as there was no representation by counsel for the General Counsel that these matters were introduced only as background, the meetings were referred to in the complaint, and Respondent had full opportunity to cross-examine these witnesses, the issues raised by these statements are deemed fully and fairly tried. These statements will be considered under the section considering the allegations involving the futility of bargaining.

[55] This case was discussed by Respondent's representatives illustrative of fines unions impose upon employees who cross picket lines. Several employees testified about these discussions.

He also said that the minority of 25 percent of the members could take the company out on strike. If the people didn't show up for their strike vote, and less than 25 percent could get out on strike. He said in Dover, New Jersey, plant, the union offices were in the ghetto and the members were afraid to go down there to the meetings and the minority of the guys that wanted a strike called could make the whole company go out. And I said we didn't have a ghetto in McCook. He said, "Well, if the union got in, you might have one."

Also during a meeting held Februray 29, according to Jack Sabin, Wright said:

> . . . the policy with Electric Hose division has always been that the McCook and Alliance, Nebraska, plants and the Olney, Texas, plant were granted the same wages and benefits and the same time, and even if we got the union in here at McCook, those other two plants would still get the same wages and same benefits as we got. and when Ocala, Florida, started work, they would also be included in the same policy.[56]

Brad Sabin[57] testified that he attended a company meeting on February 25, which was conducted by Jim Wright. According to this witness, Wright compared the Company's wages with the wages a union agreed to in Excelsior Springs, Missouri, and he said:

> . . . if the union came in, that we [the employees] wouldn't be able to talk to the management or to our supervisor. An employee asked if the union could get us better wages, and he said sometimes after long and hard negotiations, and during the negotiations everything would be put on the table and the union and the company would take turns taking everything off the table until there was nothing, and Jim Wright said that if he could grant wages and benefit increases, that he couldn't because the union would file unfair labor charges.[58]

According to Doreen Sabin,[59] during a meeting conducted by Wright on February 29, he described negotiations. Wright assertedly said that wages and benefits would be reduced to a minimum and that negotiations would begin from there. Wright also said that negotiations could take a long time and there could be no wages or benefits increased during negotiations.[60]

Wright admitted that he may have used the term "negotiate from scratch" during the mandatory employee meetings. When asked what he meant by that phrase, he replied:

> What I said was that in the meetings we would use one of these terms. There were thirteen meetings and we would use the term to emphasize a point with the employees that we did not start with what they had and negotiate from there. I used the example at this time that the union could come to the table with the $7 an hour demand and we could come back with a three dollar and something an hour, $3, offer. I also explained that during this time there was no wage or benefit change during the time of negotiation . . . .
>
> We said that the two parties would select representatives. There would be "X" number of people from the company and "X" number of people from the union. They would go to the what we call the bargaining table and they would sit down and each would present a list of demands. Everything that was in the contract would be negotiated at that time or the contract would be the results of those negotiations.
>
> We stated that, again, during this time that there were no changes in wages or benefits. We stated that each party would, as I said these were negotiations, they would give something in order to get something. Once the negotiations were over and the contract signed, that it could be something less than what they went in with. . . .
>
> I explained that the NLRB ruling was that we must negotiate in good faith with the union. It did not say anything that either side had to give and if we should bargain to an empasse [sic] or we could not get together, we asked what the results the people would do or what action they would have when the negotiating committee came back and said this is what the company offered us and this is all we could get. We ask them and they say we accept it or we would strike it. . . .

[56] This statement is also pertinent to the allegation regarding the futility of bargaining discussed below.

[57] Brad Sabin worked for Respondent until August 1980. He is the son of Jack and Doreen Sabin.

[58] In his affidavit, Brad Sabin described Wright's comments as follows:

> Jim Wright was comparing our wages to a union plant in Excelsior Springs, Missouri. He said if the union came in, we couldn't be able to talk directly to supervisors or management about our problems. . . .
>
> Employee asked if the union could get us better wages and benefits. . . .
>
> He said union sometimes did get better wages and benefits but only after long and hard negotiations. He said that during negotiations the union and company would take turns taking things off the table until there was nothing left. . . .
>
> I don't recall him saying wages and benefits would be reduced to a minimum and negotiations would begin from there. He said they couldn't grant increased benefits, wages during the campaign because the union would file unfair labor charges. . . .
>
> I don't recall him saying that would happen in negotiations.

Brad Sabin did not recall making the statements contained in the last sentence of this quote when he gave his affidavit. However, he did read his statement prior to signing it on March 5, 1980.

[59] Doreen Sabin, the wife of Jack Sabin, left the employ of Respondent in July 1980.

[60] Doreen Sabin further testified that during this meeting an employee asked if they could lose their PSC (Prescription Drug Card). Wright replied, "You're the only plant that has this." This testimony was not the subject of a charge alleging the threatened loss of benefits. However, based on the prior discussion of the opportunities for Respondent to completely address the issues related to the meetings occurring within 2 or 3 weeks of the election, the issue is considered fully and fairly tried. Also during this meeting, Wright allegedly reviewed the Union's constitution, discussed dues, strikes, and fines. He said that dues would "start at $5 but nobody knew where they would end up."

According to Kinsland, he started the meetings by explaining that because of economic conditions the Company had to engage in a lot of "belt-tightening." Then Wright talked about contracts and negotiations, explaining how the negotiating process led to the formulation of a contract. Wright stated, according to Kinsland, that when negotiations commenced, all wages, benefits, and other terms and conditions of employment were frozen until negotiations were concluded. Wright talked about the Excelsior Springs contract which, evidently, compared unfavorably with Respondent's employees' current wages and benefits.

Respondent's Position

The Company argues that, in response to several questions, Wright stated that he did not know when the next raise would be given; that it had been Respondent's past practice to grant increases every 7 to 9 months; and that he could not speculate as to the amount of the next raise. Respondent specifically denies that Wright told the employees that raises were scheduled for January and April 1980, nor that he stated that the raises would not be given because of the Union.

Also, Respondent asserts that this testimony of Ronda Weber and Max Burton,[61] who were claimed to be the only witnesses who testified that Wright said the raises scheduled for January and April 1980 would not be given because of the Union, should be discredited because, although they attended the same meeting,[62] each gave different dates, times, and numbers of attendees, and that no other employees supported their testimony.[63] Also, Weber testified she could not recall attending any company-conducted meeting within the 2 weeks immediately preceding the election.

Discussion

Wright admits stating that there would be no wage increases until negotiations with the Union concluded and that such negotiations could be long and drawn out. Respondent also admitted that it usually gave wage increases, prior to the organizing campaign, every 6 to 9 months, but that this practice was suspended because of the campaign. The increase was withheld, according to Wright, pending the outcome of negotiations, which could result in no increase at all. The employees' testimony is credited based on the admissions of Respondent's officers and the employees' demonstrated clarity of recall of these events.

There is no contention that the explanation regarding the usual increases was related to any matter other than the employees' union activities. Also, the Company did not assert that the admittedly usual and customary wage increase was not due or that the questions were premature. When, as here, the Company states that it will withhold a normally granted wage increase solely because of the union activities, it violates Section 8(a)(1) of the Act.[64] See *Associated Milk Producers, Inc.*, 255 NLRB 750 (1981); *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975); *The Gates Rubber Company*, 182 NLRB 95 (1970). That Respondent may have believed it could not grant any wage increases due to the pendency of an election is not an exculpatory factor. See *McCormick Longmeadow Stone Co., Inc.*, 158 NLRB 1237 (1966), and *Dorn's Transportation Company, Inc.*, 168 NLRB 457 (1967). That the Union may possibly file an unfair labor practice charge against the Company for granting an increase also does not render them guiltless. As the Board held in *Safeway Stores, Inc.*, 186 NLRB 930 at 931 (1970):

> Undoubtedly there will be situations where an employer who grants raises in a preelection period in conformity with past practice will face groundless charges of the commission of unfair labor practices. As the Supreme Court has observed, however: "Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establishe the fact."[2] But in the final analysis, the employer has no real dilemma: All that the law asks is that he conduct his business as he would if a union were not in the picture. "As the Board has held, an employer confronted with a union organizing campaign should decide the question of granting or withholding benefits as he would if a union were not in the picture; if his course of action . . . is prompted by the Union's presence, he violates the Act." *The May Department Store Company*, 174 NLRB 770; *Gates Rubber Company, supra.*

[2] *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51–52.

See, further, *GAF Corporation*, 196 NLRB 538 (1972). As the admitted facts of record demonstrate, Respondent's practice was antipodal to this requirement, for it stated, just prior to the election, without mentioning dependence upon the outcome of the election, that the usual and customary periodic wage increases would not be granted and the only increases considered were those proposed during negotiations because the Union commenced an organizing campaign, all conduct coercive of employees in the exercise of their Section 7 rights. Accordingly, I find Wright and Kinsland's statements violative of Section 8(a)(1) of the Act.

5. Alleged threat of loss of employment

As discussed hereinbefore, Jack Lorimer, during a discussion with Foreman Willie Welsh, stated, "Oh, I know the Union is going to get in." In reply, Welsh said, "You had better hope it doesn't." Lorimer inquired why, and Welsh reportedly said, "Well, your area will be the first

[61] Respondent did not address the credibility of the other witnesses appearing for the General Counsel regarding the allegation contained in this section of the Decision.

[62] No evidence in support of this claim, such as a roster of employees for each meeting, was placed in evidence.

[63] Again, it is noted that Respondent argued that Joy Arendell's testimony regarding her sole responsibility for the sign inferring plant closure was asserted to be credible, even though none of the friends she claimed assisted her testified nor did any other employees corroborate her claims.

[64] The complaint does not allege that such activity also violates Sec. 8(a)(3) of the Act.

to be moved out. . . . You get your chain saw sharpened, Jack."[65] When Lorimer replied in the negative, Welsh responded, "You might be needing it."

Respondent argues that Lorimer is not a credible witness because he could not remember, on cross-examination, when the purported conversation with Welsh occurred, although he stated, on direct, that it occurred on March 5. This lack of clear recollection is claimed by Respondent to be sufficient to discredit Lorimer. Welsh did not testify. Further, Respondent argues that Lorimer, during his testimony, admitted to being far removed from his work station during working time on February 8 and he was only directed to return to his work station. Disciplinary action was not taken against him even though he later disobeyed the directive to return to his work area.

Lorimer's testimony is uncontroverted and, based on his demeanor and his ability to recall the details of the conversation, his testimony if found to be worthy of belief. That, subsequent to the conversation with Welsh, Respondent did not discipline Lorimer for being away from his work station and not following orders is not a forgiving factor; first, because Welsh was not involved in the "work station" incident; and, secondly and more importantly, Respondent's motive, as stated hereinbefore,[66] is not the key to finding interference, restraint and/or coercion under Section 8(a)(1) of the Act. Expressing the belief that an employee would be "the first to be moved out" if the Union succeeded in its organizing campaign is found[67] to constitute an implied threat of discharge, in violation of Section 8(a)(1) of the Act.[68]

6. Alleged promises of benefits and solicitations of grievances and complaints

The General Counsel alleges seven separate instances where Respondent unlawfully promised benefits.

a. The first incident does not involve substantial dispute of facts. The parties' witnesses agree that, on or about September 13, Bill Bauer and Tom Torre, during a company-held meeting, discussed the impact of signing union authorization cards. Bauer told the assembled employees, "if any of them changed their mind, to try and get their card back, and I bet them a cup of coffee that they could not get their card back." Marty Cantrall,[69] in response to this challenge, obtained his union authorization card the day after the meeting. Cantrall took his card to Bauer, handed it to him, and said that Bauer owed him a cup of coffee. Bauer did buy him a cup of coffee that day.[70]

According to Leonard O'Dea, who attended yet another of the series of meetings conducted on February 25 by Wright and Bauer, Darwin Scott[71] said: "I'm a pretty young man, but I feel that our pension plan is pretty inadequate." Wright, according to O'Dea, replied: "Yes, you are probably right. . . . I have plans on my desk right now to improve the pension plan." O'Dea then inquired "how much the benefits would be increased." Bauer then assertedly said: "Nice try, Leonard. You know it would be unlawful for us to answer that."

b. The complaint alleges that, on February 25, Wright and Bauer conducted a meeting, during which a new pension plan was promised. Mike Schoup testified that he attended a meeting on this date, with about 20 to 25 coworkers. Bauer and Wright were explaining the Union's constitution when Schoup asked "how he could believe the Company when he could not believe what his W-2 form said."[72] Schoup then asserted that, in reply to this statement, "Bauer jumped off his chair and told me I knew better than that and then Wright said we had a new pension plan in the works." Wright also stated that the employee pension plan was guaranteed by ERISA. Schoup's testimony was corroborated by Cameron Martin.

Sandy Corey attended a different meeting that was held February 25, wherein Wright discussed the Union's constitution and discussed contract negotiations. Then an unnamed employee inquired if they had a pension plan and Bauer said they did, that the W-2 forms were incorrect as the result of a computer error.

c. The following day, Wright came to Sandy Corey's work station and, she avers, said "that if the union didn't get in that he would guarantee me that things would be better in six months and that he would be back in six months."[73] Wright denies having this or a similar conversation with Sandy Corey.

d. The next incident, contained in the complaint under this category, assertedly occurred on February 29. According to O'Dea, he had two conversations with Wright on that day. The first conversation occurred when:

> Mr. Wright came down to my machine in middle morning, probably 9 or 9:30 and he said, "Leonard, you don't need a union in this plant." He said, "Dayco is different than Electric Hose and Rubber Company." He said, "Give us six months to show you what we can do. Things will improve." He

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[65] Refers to Lorimer's activity of cutting wood to supplement his income.

[66] See, for example, *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

[67] Also considered is the overall atmosphere prevalent in the plant as described in the sections dealing with the posting of signs and the content of the mandatory attendance at company-conducted meetings.

[68] See *Weyerhauser Company*, 251 NLRB 574 (1980), and *Patsy Bee, Inc., supra.*

[69] A current employee who has worked for the Company about 2 years.

[70] Cantrall also testified about a meeting held August 27 wherein Bauer spoke to the employees about negotiations, and an employee inquired what would happen to benefits, to which Bauer essentially responded that all benefits would be thrown on the table and the Union would take one, then the Company would take one. Counsel for the General Counsel specifically declined to amend the complaint to include this matter, so it will not be considered to be in issue inasmuch as Respondent appeared to rely on this representation.

[71] Scott did not testify. The reason for this failure was not explained.

[72] According to Respondent, a computer error caused the employees' W-2 forms to incorrectly indicate that the employees were not covered by a pension plan.

[73] Sandy Corey then asserts that she told Wright "that we wouldn't negotiate for more than what was fair. I said I thought $6.50 per hour was fair. He said, 'There is no way this company would give you $6.50 an hour.' He said if the union did get in he could beat it at any event or arbitration." This portion of the asserted conversation is included at this point to reflect accurately the entire atmosphere. The alleged conversation about beating the Union will be considered under the section discussing the allegation regarding the futility of unionizing.

said, "We already have a campign underway to improve Electric Hose and Rubber Company's lousy management." He says, "I'm surprised that Electric Hose and Rubber Company lasted as long as it did with such poor management."

He came back again in the middle of the afternoon and—

Again he says, "Leonard, give us six months to show you what we can do." He says, "Dayco doesn't operate like this." He says, "You don't need a union." I knew he had held a meeting with the night shift the night before and I said, "Jim, how hard were you on those kids on that night shift? How bad did you lie to them?" He said, "Leonard, you known I wouldn't lie to them. If I did you would have me in Kansas City." I said, "Jim, you're not afraid of Kansas City. We already have 100 charges to file against you when the time comes." He said, "A hundred charges, is that all you've got?" He said, "If that's all you've got I haven't done my job yet."[74] He says, "We'll have another meeting Monday and you will get a chance to get some more charges."

O'Dea attended the March 4, 1980, meeting, after which he was approached by Wright who assertedly said:

> Leonard, you've been asking a lot of questions about the pension plan. Will you go with me to the office tomorrow and you can bring any four people that you want to with you and I'll give you the numbers to call and you can call and find out about it, about your pension plan. He say, "Then after you find out, you and these four people can go into the plant and give the facts to the rest of the people."

O'Dea agreed to the plan but Wright was not in the plant the following day. Wright denied having these conversations with O'Dea.

e. The next allegation is that on February 28, during a meeting conducted by Wright and Kinsland, the Company promised improved wages and pension plan. According to Clyde Swartz:[75]

> In that meeting they sent a contract out on the plant in Missouri and then also in that meeting Gordon Kinsland said he would guarantee us a better pension plan and wages and he said he couldn't give it to us right now, but he would give it to the other plants.
>
> So I asked, to see that I heard him right. I said, "Did you say you would guarantee us a better pension plan and wages?" He said, "No, I didn't say I would guarantee them." I said, "Yes, you did." He said, "All right, I will guarantee you a better pension plan and wages."
>
> In this meeting, too, Jim Wright said, "Unions are nothing but trouble and cause chaos," and if they got into Electric Hose and Rubber the plant would never be the same again.

f. The complaint alleges that, in mid-February, William Sitzman, the production manager,[76] called Randolph to Modrell's office. According to Randolph, Sitzman told him he did not call him to scold him but to inquire about an incident that occurred the night before between Kent Kotschwar and Sitzman. After discussing the incident, Sitzman said that, after the union organizing campaign was over, there would be a raise.

Sitzman recalls discussing Randolph's complaint that Modrell was adjusting his machine since the operators were requested to adjust their own machines. According to Sitzman, nothing was said about the Union or about pay raises.

g. The next incident alleged by the General Counsel as constituting an unlawful promise of benefits also involved Sitzman. According to Dennis McFarland, on March 6, after voting, at approximately 3:10 p.m., Stizman passed by his inspection station and said, "Dennis, win, lose or draw, no hard feelings." McFarland replied that he held no hard feelings, that if "we" lost, "we" are going to begin a fight. Sitzman then said, "Well, I will tell you that you've woke the company up and the people in the company and there will be changes in the future."

Sitzman recalled an occasion, a day or so after the election, when he was walking past McFarland's work area and McFarland said he would like to talk to him. Sitzman then walked over to him and McFarland said he was glad the union campaign was over. Sitzman indicated he was also glad it was over. McFarland then stated, "Well, I hope everybody realizes that we have some problems here." Sitzman replied, "I'm sure you do. I think you have made us aware that we do have some problems."

h. The General Counsel alleges that, in the latter part of February 1980, Sitzman told Doreen Parsons[77] he wanted to learn about some of the employees' complaints.

Doreen Parsons testified as follows:

> He [Sitzman] came up and asked me if he could ask me a question. I told him it depended on the question.
>
> He went ahead and asked me if—about some of the complaints that myself and some of my fellow workers had in the wardwells. I told him that basically we were pushing for better benefits and better wages and working conditions. He told me that he couldn't do anything about my wages or my benefits but he wanted conditions. So I proceeded to tell him. I told him that we turned in complaints week

[74] The similarity of this statement to one described hereinbefore is noted and is considered in the credibility resolutions.

[75] Swartz, a current employee, has worked for the Company for 4-1/2 years.

[76] Respondent admits Sitzman is a supervisor.

[77] Parsons is currently employed by Respondent.

after week to our safety committee[78] and nothing was done about them.

He wanted some examples so I went ahead and gave him a few. I told him that there was constantly oil on the floor around the machines that was supposed to be cleaned up by the servicemen but it was never—it was always constantly there. I kept turning it in and nothing was done about it. I told him that we should go back to our old earplugs that we had because the ones that we had at the moment were cotton and they were wrapped with plastic on one end and you stick them in your ear and just as soon as you got busy, about 10, 15 minutes later, they would be falling out again. The old ones were yellow foam and they stayed in your ears pretty well.

Then I told him that there were some holes, a couple of holes in the north wall of the plant by the yarn weighing department that you could see daylight through. There was a bunch of electrical wiring and stuff around there and whenever it rained or snowed or anything the water would come in through these holes and they got quite a bit of yarn wet on one occasion, which isn't very good. The yarn was so that you couldn't use it.

He said that he would see what he could do about by complaints. He took down notes while I was telling him these things. He told me that he knew that we ladies in the wardwells worked very hard and we deserved a little bit more. He told me that we had their attention and that hopefully things would be better from now on.

I said "Yes, I hope so, too." I said it was a shame the way this campaign thing was getting to people. It was going outside the work area, that was getting into personel relationships and friends, too and that I hoped things could be better, also. He said, yes, he hoped so, too.

She then returned to her work and observed Sitzman talking to her supervisor, Phyllis Kotschwar. Then he went towards the yarn weighing department and examined the holes. A couple of days later, the holes were sealed. With respect to the earplugs, although nothing was subsequently said, she noted several weeks later that the Company had restocked the old-style earplugs.

Sitzman recalled the conversation with Parsons. He stated that her comments were in reply to his inquiry, "how was everything going." She replied, "not very good." It was this reply that prompted him to ask why. Sitzman recalls discussing most of the matters Parsons mentioned but could not recall earplugs being mentioned. Immediately after this conversation, he talked to Parsons' supervisor about her comments. Kotschwar said she was aware of the hole in the wall and had put some tape over it. Sitzman stated that that was inadequate and described how he wanted the problem rectified. Kotschwar said she would take care of it. Sitzman also discussed the housekeeping problems, such as the oil on the floor. Also, he inquired if Kotschwar knew Parsons was late for work due to a series of doctor's appointments and they decided they would not dock her pay.[79]

[78] These committees were mentioned by several witnesses, but there is no allegation that the creation of these committees was violative of the Act, and the matter was not fully and fairly tried.

Respondent's Position

The Company argues that Bauer's offer to buy a cup of coffee was not a promise, just a comment that the employees would find it difficult to get the authorization cards back if they changed their minds. Furthermore, they assert, even assuming the statement constituted a "promise," a 15-cent cup of coffee should not be considered sufficient inducement to the employees to abandon their position of support for the Union. Therefore, Respondent argues, the statement cannot be considered a promise for there is no evidence that offer was made to interfere with the employees' organizing efforts. Citing *Pellegrini Bros. Wines, Inc.*, 239 NLRB 1220 (1979). Prior to discussing the merits of the allegation, this case is found inapplicable for the dismissal of a charge alleging promise of benefits which was based upon a finding that the employer's decision was unrelated to union activities.[80] The record in this proceeding clearly shows that the offer to buy the cup of coffee was dependent upon an employee getting back an authorization card, which is directly related to union activity.[81]

As previously indicated, the decisional nexus is whether the setting, conditions, situation, and other ramifications of the probative evidence of the employer's conduct can be approved, in reasonable probability, as having the effect of interference, restraint, or coercion of the employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

In this case, a high-level manager admitted betting the employees they could not get their authorization cards back. The purport of the bet is once an authorization card is signed, an employee, he wagered, could not change his or her mind.[82]

The act of getting a card back was equated, by Bauer, to an employee changing his mind, and the demonstration of such a change of mind would result, after proving it to Bauer, in the acquisition of a cup of coffee. The pecuniary value of the reward for such a renunciation of union support is not outcome determinative, and it is found that the inescapable inference from the tendering

[79] The appointments apparently were related to an eye injury sustained during and in the course of employment.

[80] 239 NLRB at 1229.

[81] The General Counsel, in support of its position that the offering and subsequent purchase of coffee is violative of the Act, cites *Ida Turner, d/b/a I. Turner Canvas and Upholstery Company*, 138 NLRB 768, 773 (1962). This case is also considered inapplicable for the coffee incident involved therein was that the employer stopped supplying coffee on one Saturday, contrary to established custom. However, the evidence indicated there were other prior occasions when coffee had not been supplied. Accordingly, it was concluded that the allegation that the elimination of this benefit was a deliberate reprisal was not supported by substantial evidence and dismissal was recommended.

[82] "Webster New Collegiate Dictionary," G. & C. Merriam Company, Springfield, Massachusetts, 1977, defines the term "bet" as follows: "1a: Something that is laid, staked, or pledged typically between two parties on the outcome of a contest or a contingent issue: WAGER b: the act of giving a pledge. 2a: To stake on the outcome of an issue. b: To be able to be sure that . . . ." Therefore, it is found that the term "bet" signified a promise to pay if the announced contingency occurs.

of such a reward was to coerce employees to refrain from signing authorization cards by misstating facts[83] and promising a reward, albeit small, as an inducement to an employee who demonstrated that he successfully renounced the Union by showing Bauer his union card. Therefore, it is found that Bauer's "bet" statements were violative of Section 8(a)(1) of the Act.

Much of the testimony regarding the Company's pension plan dealt with an explanation of an error on all the employees' W-2 forms. However, Mike Schoup testified, with corroboration, that a new pension plan was being considered by Respondent. Wright did recall that during the February 27 and 28 meetings questions about pensions were asked at all of the meetings. According to Wright:

> Someone asked in one meeting if it [pensions] were going to be increased. I told them that this plant had been in operation long enough that it was becoming concern. I explained to them that the Olney, Texas, plant which was only five or six years old had no need for the pension at that time because there was no one ready to retire. There were people at this plant who were getting to the age now that retirement was a concern to them. That was something that really had not been, there had not been an . . . emphasis on increasing the retirement in this plant. At that time, I explained to them again, I felt like that over the years in my past experience with the company, I have seen benefit changes and I think that if the company grows that they're going to see changes. Again, I emphasized that this would happen regardless of whether there was a union or not.

Additionally, Wright and many other witnesses also testified about changes in medical insurance at McCook, as well as at the Alliance and Olney plants. The employees were unhappy about the slowness in the payment of claims and the low major medical coverage. Wright informed the employees at the same meeting that the Company had changed insurance companies and increased major medical coverage from $15,000 to $100,000. The modification of major medical coverage and change in companies serving the employees are not alleged as violations of the Act. Since this matter is found to have been fully and fairly tried it will be considered herein.

With respect to the medical insurance, on September 20, 1979, Tom Torre circulated the following notice:

> ANNOUNCING
> September 20, 1979
>
> On October 2, 3, 4, & 5 (The 5th if necessary), DAYCO'S insurance officer will be in McCook to answer any questions employees and their spouses may have in regard to the equitable insurance.
>
> The meetings will be held at the Chief Restaurant conference room from 8:30 AM—11:00 AM and 1:30 PM—4:30 PM and again at 7:30 in the evening.
>
> TOM TORRE
> PERSONNEL MANAGER

On January 15, 1980, Bauer wrote the following letter:

> Medical costs when hospitalization is required are out of sight and are climbing higher and higher. A serious illness or injury can wipe out a family's lifetime savings overnight.
>
> We know this is a matter of concern to all of our employees. We are pleased to announce that your Lifetime Major Medical insurance coverage will be increased from $15,000 to $100,000. This change will be effective on February 1, 1980 and it will be at no cost to you.
>
> We hope that none of you ever need to use this benefit. But if you do, you can spend your time in getting well—and not in worrying how to cover your expenses.

On February 21, Bauer circulated the following special announcement:

> TO: ALL EMPLOYEES OF ELECTRIC HOSE & RUBBER COMPANY
>
> Effective March 1, 1980, as previously announced, you will have a new Drug-Prescription Card which will be issued the week of February 27, 1980. This new drug card will provide you with the same benefits as your old one.
>
> Also beginning March 1, 1980, our insurance administrator will be the Metropolitan, instead of the Equitable as it has previously been. We decided to change because Equitable has been too slow in processing your claims. The coverage under the Metropolitan Insurance plan is identical with the one Equitable had. Thus, there will be no change in your insurance coverage.
>
> As you know, Electric Hose & Rubber Company, Inc. pays for 100% of the premium for you and your family for this insurance. We supply this health insurance to you at absolutely no cost to you. Nothing comes out of your pocket to pay for this insurance premium.
>
> We will continue to provide our employees with the best benefits available.

On April 1, 1980, less than a month after the election, Bauer made the following announcement:

> We are pleased to announce a general wage increase of .50¢ per hour effective 3/31/80. Our last general wage adjustment of 8.4%, or about .40¢ per hour, was effective just 7 months ago, on September 1, 1979. Together these two increases have raised the general wage level by about 20%.
>
> As you know, we are experiencing a downturn in our production volume as the business recession deepens. However, we still recognize the effect on everyone of the severe rate of inflation we are experiencing in this country. This latest adjustment

[83] There was no basis demonstrated to support Bauer's statement that it was almost impossible to get the Union to return cards.

should help us get through these inflationary pressures.

In addition to the wage increase, we have improved several other benefits:

MEDICAL CARE PROGRAM

1. We have increased the hospital room and board from the present 180 days limit to the new limit of 360 days.

2. The payment of doctor visits at the hospital has been raised to $10.00 per visit from the present $5.00 per visit.

We have also raised the sickness and accident benefits from the present $60.00 per week to a new limit of $80.00 per week.

We are structuring a major increase in our pension benefits as follows:

1. Effective 11/1/80, the benefit will be increased $1.00 per month, times years of service, to $6.00.

2. Effective 11/1/81, the benefit level will be increased $1.50 per month, times years of service, to $7.50.

3. Effective 11/1/82, the benefit level will be increased $2.00 per month, times years of service, to $9.50.

As you can see, this is a significant increase resulting in almost doubling of the pension benefit over the next three years.

We feel that these increases in wages and benefits are an indication of our sincere concern for the well being of our many loyal and dedicated employees.

Similar announcements were made in Respondent's Alliance, Nebraska, and Olney, Texas, plants. Wright stated that the modifications were prepared, he believes, about the third week of March. Then, Fred Sanford, an executive vice president, made the final decision and the individual guidelines were given to the individual plant managers. Wright discussed the benefit improvements with Kinsland who then would have taken the proposal to the executive vice president for discussion. Then the proposed increased benefits would have been presented to Carlton Holt and then Dayco.[84]

Discussion

The implementation of improved wages, as well as improved pension and medical benefits, even though the promises came to fruition after the election, lends credence to the employees' assertion that such promises were made and, based on their demeanor, inherent probabilities, and the other factors mentioned hereinbefore, the testimony of the employees that Respondent made the alleged promises of benefits and solicited grievances is therefore credited.

Where benefits are announced and granted to employees during a union organizational campaign, and the employer had knowledge of such campaign, the employer has the burden of showing that the timing of the announcement and the granting of such benefits were governed by factors other than its knowledge of such union activity. *Idaho Candy Company*, 218 NLRB 352 (1975). Generally, this burden is met by evidence establishing that the benefits were granted in accordance with past practices and/or that the decision to grant the benefits had been made prior to the employer's acquisition of knowledge of the union activities. *Madison Midwest Nursing Care, Inc., d/b/a Anna-Henry Nursing Home*, 236 NLRB 1135 (1978). As found above, the decision to grant the benefits was made after acquisition by the employer of knowledge of the union activities. The medical and insurance benefits were not shown to have been subject to periodic increases as a past practice and, although wage increases were historically given on a periodic basis, it has previously been found that Respondent indicated to the employees it was abandoning this practice in response to the union organizing campaign.

It is therefore concluded that Repondent made promises of benefits while speaking to employees as a means of dissuading the employees from supporting the Union. That similar benefits were also granted to other plants does not protect the employer from a finding of an 8(a)(1) violation for there is an inference that the employees would get the same benefits without the Union. In fact, as discussed *infra*, there was an inference that, if the Union represented the employees, they may get less than workers at Respondent's other plants. See *Casey Manufacturing Company*, 167 NLRB 89 (1967); *Dixisteel Building, Inc.*, 186 NLRB 393 (1979); *Montgomery Ward & Co., Inc.*, 222 NLRB 965 (1976); *GTE Sylvania Incorporated*, 227 NLRB 146 (1976), and *American Telecommunications Corporation, Electromechanical Division*, 249 NLRB 1135 (1980).

Also, these increases in benefits were implemented during the pendency of the Union's objections to election. Such increases were implemented despite Respondent's assertion that business greatly diminished the layoffs and possible plant closings and was the basis for withholding the usual wage increase; in this circumstance, I further find that Respondent was rewarding the employees for rejecting the Union and was also seeking advantage in the event the Union prevailed in its objections and a second election was ordered, in violation of Section 8(a)(1) of the Act. See *Eagle Material Handling of New Jersey*, 224 NLRB 1529 (1976), enfd. 448 F.2d 160 (3d Cir. 1977); *Westminster Community Hospital, Inc.*, 221 NLRB 185 (1975); *Felsenthal Plastics, Inc. n/k/a Grede Plastics, a Division of Grede Foundries, Inc.*, 224 NLRB 1312 (1976); *Centralia Container Corporation*, 195 NLRB 650 (1972). See also *Raley's, Inc.*, 236 NLRB 971 (1978), enfd. *sub nom. Retail Clerks Local 588, Retail Clerks International Association, AFL-CIO*, 587 F.2d 984 (9th Cir. 1979); and *Marcus J. Lawrence Memorial Hospital*, 249 NLRB 608 (1980).

Sitzmans' inquiry of Parsons was not shown to have been an established practice and his immediate reaction to her longstanding, often-repeated complaint demonstrated quick rectification of complaints thereby obviating the need for union representation in violation of

[84] Kinsland testified he recalled meeting with Wright sometime in mid-March or the latter part of March concerning the proposed increased benefits.

Section 8(a)(1) of the Act. *Hadvar, Division of Pur O Sil, Inc.*, 211 NLRB 333 (1974).

7. Alleged unlawful removal of union insignia

The complaint alleges several instances where Respondent removed union insignia while allowing antiunion material to remain posted, and banned the further posting of insignia, under penalty of adverse action.

a. The first alleged incident occurred on or about February 6, 1980. According to Nadia Schoup,[85] on that day she saw Rod Koetter, her supervisor, walk over to her machine and remove a URW sticker. She inquired why he was taking the URW sticker down and leaving the Company's sticker up. Koetter reportedly said "that the company would leave up what they wanted to leave up." Koetter did not testify.[86]

b. Dennis R. McFarland testified that, on February 8, Lester Randolph, a coworker, came over to his inspection station and stuck a support URW sticker on the machine. McFarland turned around to perform some job-related activity. George Ward, his supervisor, came by and inquired how the work was progressing, and then McFarland turned back and saw Ward throw a piece of paper in the wastepaper basket. McFarland immediately went over and retrieved a support URW sticker from the wastepaper basket. What other material the wastepaper basket contained was not addressed on the record. McFarland did not see Ward remove the sticker. There were no other "support URW" stickers within 70 feet of the inspection station. Ward did not testify.

c. Another incident alleged in the complaint is that Phyllis Kotschwar, on February 18, removed union stickers from on and around Doreen Parsons' work station. According to Parsons:

> Phyllis [Kotschwar] was going around my immediate work area taking union stickers down off the machines and walls and poles and tubs, wherever they were placed, and she came over to me. I was respooling one of my machines. She came over and said that she hadn't actually seen me put up any of the stickers but if she did then she would have to write me up. I replied that there wasn't anything wrong with putting up stickers. She told me that it was defacing company property and if she caught me doing it she would have to write me up . . . . I asked her if she was taking down the union stickers if she didn't have to take down the vote nos, also, and she said yes, if she saw one that she would. So I pointed out the vote no sticker that was right there in plain sight and after I pointed it out she went over and took it down.

Although there were a couple of "vote no" stickers in the area at the time, Kotschwar was seen removing only one. Kotschwar, as previously noted, did not testify.

Other Testimony Relative to the Display of Union Insignia

Jack Sabin testified that, prior to the election, he "saw company literature posted up all over" and he saw Torre posting this literature. Also pertinent is the previously recited testimony about the poster Joy Arendell had printed and distributed around the plant.

Arendell testified that she saw URW stickers "everywhere around the plant." In February she asked her supervisor, Daryl Brown, if they could do something about the stickers. Brown assertedly replied that "there is nothing I can do." Arendell stated she removed some stickers and threw them in the trash. She did not see Brown or any other supervisor remove any stickers. Arendell posted some of her own stickers around the plant as well as hanging her poster. She did not see anyone from the Company remove the posters. Her testimony did not address the question of the fate of her stickers at the hands of supervisors; however, she said none are currently posted, but one is lying out at her work station.

Clyde Swartz, in his affidavit, stated that Daryl Brown tore down company literature that was posted. When such action was taken is not mentioned and, since it could have occurred well after the organizing campaign, this testimony is not demonstrative of company policy or even-handed treatment of all posted literature. Brown did not testify. Kinsland and Wright both saw literature posted around the plant. Kinsland did not examine any of the literature but saw both pro and antiunion literature posted. He did not order anyone to remove the material. O'Dea's testimony that he saw one of the Arendell signs posted until several weeks prior to this hearing is uncontroverted, and is further demonstrative of the absence of a company policy to remove campaign literature or other posted material.

Discussion

The display of union insignia is treated by the Board in a manner similar to the maintenance of a no-distribution rule.[87] The display of union insignia is a recognized and protected activity. The promulgation of a rule prohibiting the display of such insignia constitutes a violation of Section 8(a)(1) in the absence of a showing of "special circumstances,"[88] or the impairment of the employee's right to continue his normal activities during a union's organizational campaign. In this case, Respondent does not claim to have a distribution rule of any other policy governing the posting of notices or insignia.

[85] Nadia Schoup has been employed by Respondent since 1976. She is married to Mike Schoup who is also a current employee of the Company.

[86] Schoup also testified about another conversation with Koetter, which she asserts occurred on or about February 8, 1980. The complaint does not allege that any of the statements she attributed to Koetter, including threats of strike and replacement due to strike if the Union got in, were violations of the Act. There was no motion to amend the complaint. The lack of motive that this allegation may be in issue, in a proceeding involving more than 40 allegations of violations, requires the conclusion that this matter was not fully and fairly tried.

[87] There is no contention that the posting of prounion literature was in contravention of a no-solicitation/no-distribution rule. Inasmuch as the union insignia cases deal with the wearing of buttons, the display of prounion literature does not fall directly under the union insignia cases. The philosophy underlying the union insignia cases and the no-distribution cases, however, is similar, and these allegations will be handled pursuant to that reasoning.

[88] Wearing union buttons: *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962); *Associated Milk Producers, Inc., supra*. Distribution of union literature: *Magnesium Casting Company, Inc.*, 250 NLRB 692 (1980).

Respondent argues that the testimony demonstrates that both prounion and procompany literature was removed, therefore this allegation should be dismissed. Respondent did not explain its failure to call the three foremen, Kotschwar, Ward, and Koetter. In *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977), the Board found:

> The Respondent has excepted *inter alia* to the crediting of testimony presented by General Counsel's witnesses contending that it was improper for the Administrative Law Judge to credit testimony merely because the Respondent failed to produce its own witnesses to refute the former's testimony. We find no merit in the Respondent's contention. In crediting the testimony of the General Counsel's witnesses, the Administrative Law Judge not only relied on the demeanor of the witnesses, but also implicitly relied on the "missing witness" rule which states that "where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him." 29 Am. Jur. 2d Section 178. See also *Avon Convalescent Center, Inc.*, 219 NLRB 1210 (1975); *Bricklayers Local Union No. 1 of Missouri . . . (St. Louis Home Insulators, Inc.)*, 209 NLRB 1072 (1974). Inasmuch as the Respondent has offered no explanation as to why its supervisors did not testify at the hearing, we find the drawing of an adverse inference against the Respondent and the crediting of the General Counsel's witnesses was proper. See also *Interstate Circuit, Inc.* v. *The United States*, 306 U.S. 208, 226 (1939): "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse . . . . Silence then becomes evidence of the most convincing character." *Publishers Printing Co., Inc.*, 233 NLRB 1070, 1071, fn. 1 (1977); *Gulf-Wandes Corporation*, 236 NLRB 810 (1978); *Wal-Lite Division of United States Gypsum Co.*, 200 NLRB 1098, 1100–1101, fn. 8; *M. J. Pirolli & Sons, Inc.*, 194 NLRB 241, 246, and fn. 21 (1971).

There are no valid bases to discredit the employees' testimony. It is therefore concluded that Koetter did remove prounion stickers while leaving procompany literature posted which was disparate treatment not shown to be justified by special circumstances or to be justified to promote production, maintain discipline, or for any other business reasons.

The failure of Ward to testify otherwise warrants a finding in agreement with McFarland's circumstantial conclusion that Ward did remove a "support URW" sticker from his machine without justification. The display of support for the Union, particularly during an organizing campaign, is a protected activity under Section 7 of the Act. *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793, 802, fn. 7. The removal of the sticker by a foreman implies disapproval and, further, implies reposting of the sticker would result in reprisal. The threat of reprisal was explicit in Kotschwar's statement to Parsons. Accordingly, Respondent's actions are found to be violative of Section 8(a)(1) of the Act.

8. Alleged unlawful discontinuance of overtime

O'Dea testified that, when he first started working for the Company in January 1976, the mechanics shut the machines down about 20 minutes before the end of shift:

> He commented to one of the lab technicians that the company was losing a lot of production, a lot of time by shutting the machines down for 20 minutes. The town is supplied by hard water which creates a problem for the machines because the machines would either set up and get cold during the time they were turned off or they would overheat and burn up and would take anywhere from half an hour to an hour for the machines to get started for the following shift. So the company was losing anywhere from an hour to an hour and a half during these shut down periods. Therefore, O'Dea suggested that the company could cut down the loss of money and production by not shutting the machines down but leave them running during the shift change. About 4 months later his foreman Steve Beres came up and told him don't shut your machine down today. We are going to keep the machines running through shift break. So by letting the machines run, it would take about 15 minutes to put his tools away, finish up his paperwork, get cleaned up, and get out of the plant after end of shift. Or it could be after the end of shift at 11 which was the shift he was working. Since that meant that he was losing 15 minutes time on the clock, he went over to his foreman and demanded overtime for the time and he got it. Some of the other operators heard about it and they started demanding overtime pay also. But all the foremen were not paying their operators overtime for getting into work early and some of them were allowing the overtime for getting out late.
>
> This changed in late summer or early fall in 1979. His foreman, Lee Guthrie, at that time came to him and said, "Leonard, the company is changing their daily report, records. You will have a new sheet to fill out. The sheet," he said, "from now on you will be paid from this daily activity sheet rather than from your timecard." He responded that was fine but he wanted to be paid for every minute he worked. He was told he would get paid if he put it on his activity sheet. After that, O'Dea wrote in on his activity sheet every time he clocked out at night. He got paid for it.
>
> About a week later they came to him and said Leonard, everybody has been doing this thing different. Some of the foremen are paying their men for coming in early and some are paying for getting out late. He stated they were going to change the policy to make it uniform and informed them that he was not getting paid for overtime for getting out

late, they were going to allow 3/10ths of an hour overtime to arrive at work early and take over the machines from the other operators. He further stated that the next shift would do the same for him, get there early so there would be no reason for him to get out of the plant late.

Up until that time some of the air chargers and the pan turners weren't getting the overtime pay but after they started the new system, all the workers in the production area and all the three shifts got the overtime pay.

He actually received overtime pay from October or November 1975 until the middle of February 1980.

On or about February 15, 1980, O'Dea was informed by his foreman, Lee Guthrie,[89] that effective Monday, February 18, "early-in overtime" would be eliminated. O'Dea was instructed to shut his machine down 15 minutes before quitting time. Guthrie was telling O'Dea that the Company could not take away a benefit during a union organizing campaign and that he would file charges "with the Labor Board against the company for it." The "early-in overtime" was discontinued on February 18, 1980. According to O'Dea, the Company furhter instructed him not to go to his machine early and, if he arrived at work early, to go to the cafeteria.

O'Dea further testified that one night, 3 or 4 weeks after "early-in overtime" was eliminated, Sitzman stopped by this machine. O'Dea told him he thought it was ridiculous because of the amount of time lost due to the shutting down of the machines. Sitzman asertedly said, "Leonard, it's not my idea to shut the machines down. It's costing the company a lot of money in lost production."

Sitzman recalls having a conversation with O'Dea shortly after the Company eliminated "early-in overtime."

> He was walking through the area and O'Dea hollered at thim and he went over to see what he wanted or needed. O'Dea asked him if he was aware of the fact that they were losing production by not having this early-in time. He replied yes, we were, that it helped with production when they needed it but at this particular time they didn't need it. They had hose coming out of their ears. The finish area was even starting to collect up back there because the warehouse was full.

On March 8, according to O'Dea there was a notice on the plant bulletin borad that stated effective immediately there would no more Saturday overtime or Sunday night startup overtime. Then, on September 24, during a safety meeting, the "foreman made the statement that there was a lack of cooperation and communication in the plant, that he thought they could do a better job of finding out from the operator ahead of them about the compound, about the machine, the way it was running, the way the hose was running. They started going back to the machines again but they're not being paid overtime."[90]

According to Douglas Winder,[91] the practice of paying three-tenths of an hour overtime for getting to work early existed from around September 1979 to about the middle of February 1980, Winder understood the purpose of getting to work early was to keep the machines running to smooth production, and to ascertain how the machine was running.[92] Also, one shift visited with the other during "early-in" time. Winder frequently visited with his father and they would talk about the family, unions and nonwork-related subjects.[93] The decision to eliminate the "early-in overtime" affected everybody in the production department.

Bauer the plant manager, testified that he alone made the decision to eliminate the "early-in overtime." It was admitted that the decision impacted upon all employees. He informed his supervisors of this decision at a meeting that Thursday or Friday before the staff was informed on February 18, 1980, and said that the new policy would be effective immediately. The supervisors were informed that the Company no longer had enough order to sustain the early-in overtime. The Company denied that the purpose of the overtime was to save warmup time, rather it was to meet production requirements.[94]

An employer can reduce earnings by the elimination of overtime during an organizing campaign if it can be shown to have been motivated by an overriding employer interest in efficient operation of its business and not to discourage employees from concerted protected activities. See *M. S. P. Industries, Inc., d/b/a The Larimer Press*, 222 NLRB 220 (1976).

Therefore, the controlling question is whether the Company has demonstrated a legitimate and substantial business justification for the elimination of early-in overtime. Respondent asserts that the economic conditions resulted in a major diminution of business requring the elimination of early-in overtime. In support of this contention, the Company placed in evidence a production status plan projecting expected production from September 1979 through September 1980. Although actual production statistics were available, Respondent chose not to introduce them into evidence. Projections, the validity of which was not demonstrated, are not considered probative of actual production. Furthermore, actual operating results, including profits and losses, were not intro-

[89] Guthrie did not testify and no reason was given for his absence.

[90] Again, the foreman did not testify and no reason for this failure was advanced by Respondent.

[91] Winder, a current employee, has worked for Respondent about 15 months.

[92] Prochazk testified the employees also determined what kind of compound they were running, the type of hose they were running, and the footage left to run.

[93] Marty Cantrall, Ronda Weber, Mark Prochazka, Mike and Nadia Schoup, and Cameron Martin corroborated Winder's testimony, including the estimate of when "early-in overtime" started, August or September 1979.

[94] Bauer did not address the assertion of several of the employees that the early-in overtime was utilized to ascertain how best to continue the manufacturing process by checking such matters as the compound, the type of hose to be run, etc. These matters could be considered production; however, the failure to state with specificity why it was more economical to eliminate the warmup period and exchange of information renders his blanket denial less credible.

duced into evidence. The layoffs eventually occurred after the elimination of early-in overtime does not clearly prove that a legitimate and substantial business justification was present in mid-February. In fact, Respondent's admission that documentation, solely within its control, supporting its claim of economic justification, was not introduced, requires the drawing of an adverse inference. As the court held in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)* [*Gyrodyne Co.*] v. *N.L.R.B.*, 459 F.2d 1329, 1336 (1972):

> Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. As Professor Wigmore has said:
>
> > . . . The failure to bring before the tribunal some circumstances, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted. [2 J. Wigmore, Evidence 285 (3d ed. 1940).]
>
> . . . [As stated in *Northern Railway Co.* v. *Page*, 274 U.S. 65, 74 (1926)]: "[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his clause."[42]

[42] See also *Transcontinental Gas Pipe Line Corp.* v. *Mobile Drilling Barge*, 5 Cir., 424 F.2d 684, 694 (1979); *Washington Gas Light Co.* v. *Biancaniello*, 87 U.S. App. D.C. 164, 167, 183 F.2d 982, 985 (1950); In re *Chicago Rys. Co.*, 7th Cir., 175 F.2d 282, 290 (1949).

The failure to subpoena the evidence in no way diminishes the impact of the adverse inference rule. See *Id.* at 1338.

There are several other reasons to find that this defense lacks credibility. Respondent's bare assertion that all employees, rather than just the production department employees, were adversely impacted by the decision demonstrates a lack of forthrightness inasmuch as it is unrefuted that only production employees were given early-in overtime. Respondent also failed to refute, with probative evidence, the employees' and O'Dea's claims that, due to the hard water situation, keeping the machines running was more economical, that they were required, in September, to go to their machines early to ascertain what job was being run and other information from the operator on the preceding shift, but were not paid for their efforts. The lack of refutation lends additional credence to the employees' assertions that information about the job was exchanged during the early-in overtime which permitted a more efficient and effective assumption of duties. Therefore, the efficacy of the early-in program was not solely attributable to the continued operation of the machines.

Respondent's failure to support its defense of "economic exigencies," conjoined with the findings herein of other violations, and the overall atmosphere prevailing at the time, leads to the conclusion that the defense is pretextual and the genesis for the decision to eliminate early-in overtime several weeks before the election was in retaliation against and/or to discourage union activities rather than for legitimate business reasons, in violation of Section 8(a)(1) of the Act. See *Overnite Transportation Company*, 154 NLRB 1271 (1965).

9. Alleged statements that it would be futile for the employees to select the Union as their representative

It is undisputed that Respondent conducted a series of meetings with employees in groups of 15 to 30 who were required to attend. It is also admitted that high-level supervisors made comments regarding the negotiating process and the possible effects of unionization. The General Counsel asserts that these statements, when considered with the other asserted violations, informed the employees that it would be futile for them to select the Union as their collective-bargaining representative. Almost all of the employees that testified herein mentioned statements made by Respondent's representatives at these meetings.

a. *O'Dea*

O'Dea stated he attended a meeting on February 25 which was conducted by Wright and Bauer.[95] According to O'Dea:

> Mr. Wright was leading the meeting and he was picking paraphrases from the URW constitution and he was telling us about the strikes and fines, dues and trials. I asked him how I could be fined in a right to work state and he told me that I could be taken to union headquarters out of state and fined. He told us about the Coates[96] case in California, how she had been fined for crossing the picket line. He told us that if the union did get in we would have to negotiate a contract from scratch and that we could possibly end up with less than what we already had.

[95] This meeting was held at or about 7 a.m.

[96] The Sophie Coates case, as previously mentioned, was discussed by Wright who recalled distributing to the employees "some type of bulletin and telling the employees that Sophie Coates crossed the picket line and the union fined her and that they fined her an excessive amount of money." When asked if the pamphlet he circulated regarding the Sophie Coates case stated that she got her money back, he said he did not recall, that he would have to read the document. Wright recalled that Bauer answered the question but he does not remember the response.

I told him it would be silly for us to sign a contract for less benefits or monies than we already had. He said that he knew of cases where people had ended up with less after negotiations then they had before negotiations. He said that he even knew of cases where people had gone out on strike and had to go back to work with less than they had before they went out on strike. He told us that negotiations could take months, even years, to complete.

b. *Jack Sabin*

Jack Sabin also attended a February 25 meeting.[97] As he recalled:

Well, Jim Wright went through the URW constitution telling about the dues and the fines, and he discussed the Sofie Coates case. He said that if we brought a union in and we went down to negotiations, would we be willing to give up maybe our vacation and our insurance, because he said he would probably be the negotiator and the company negotiates tough with the Union on a union contract. He said that when you start to negotiate, you start from scratch and then go from there and not to let the union rep tell you that you began negotiations from where you're at in respect to wages and benefits.

He also said that the minority of 25 percent of the members could take the company out on strike. If the people didn't show up for their strike vote, and less than 25 percent could get you out on stirke. He said in Dover, New Jersey, plant, the union offices were in the ghetto and the members were afraid to go down there to the meetings and the minority of the guys that wanted a strike called could make the whole company go out. And I said we didn't have a ghetto in McCook. He said, "Well, if the union got in, you might have one."

Jack Sabin also attended a meeting held on February 29, 1980, which was conducted by Wright and Kinsland, during which:

He [Wright] was discussing the plastic hose plant down in Missouri, I think it was Excelsior Springs,[98] Missouri, but anyway it was a lower paying contract, and he said they still had the dues and they got the fines to pay, and would you want something like that. One of the employees asked him if the union was so bad, then how come they didn't close up the union plants they had. And that's when Mr. Kinsland said, he could answer that. He said, "Lately the union and the company have been getting along a lot better," but that they were building a plant in the south and when they got it in full production, they would have to reevaluate the plants in Waynesville, union plants in Waynesville and Springfield and see how it stood then because they were going to have to do something.

But anyway he said the policy with Electric Hose division has always been that the McCook and Alliance, Nebraska, plants and the Olney, Texas, plant were granted the same wages and benefits at the same time, and even if we got the union in here at McCook, those other two plants would still get the same wages and same benefits as we got, and when Ocala, Florida, started work, they would also be included in the same policy.

c. *Brad Sabin*

During the February 25 meeting Brad Sabin attended,[99] Wright assertedly:

. . . was comparing the company's wages with the union's wages in Excelsior Springs, Missouri, and he said if the union came in, that we wouldn't be able to talk to the management or to our supervisors. An employee asked if the union could get us better wages, and he said sometimes after long and hard negotiations, and during the negotiations everything would be put on the table and the union and the company would take turns[100] taking everything off the table until there was nothing, and Jim Wright said that if he could grant wages and benefit increases, that he couldn't because the union would file unfair labor charges.

On cross-examination, after being shown his affidavit dated March 1980, Brad Sabin admitted it contained the following statement: "I don't recall him [Wright] saying wages and benefits would be reduced to a minimum." On redirect, he claimed lack of recall as to the quoted sentence and reaffirmed that Wright made all the other comments as he alleged during direct examination.

d. *Doreen Sabin*

According to Dorren Sabin, during the March 29, 1980,[101] meeting she attended:

He [Wright] went through the URW constitution talking about dues, strikes and fines. He said that the dues would start at $5 but nobody knew where they would end up. We talked about negotiations. He said that wages and benefits would be reduced to a minimum and that we would begin negotiations from there. Negotiations could take a long time and there could be no wages or benefits increased during negotiations. An employee asked if we could lose our PCS card, Prescription Drug Card. He said, "Well, you're the only plant that has them."

Then he went into a deal with Sofie Coates, California workers, who was finded for crossing a

[97] This witness did not state at what time the meeting was held but he worked the 7 a.m. to 3 p.m. shift.

[98] According to Wright, the Excelsior Springs, Missouri, plant is a small hose plant owned by Gates Rubber Company. Excelsior Springs is near Springfield, Missouri.

[99] Brad Sabin did not state at what time this meeting was held. He worked the 11 p.m. to 7 a.m. shift.

[100] See also Marty Cantrall's testimony which is corroborative of Sabin's statements.

[101] This meeting occurred at approximately 1 a.m.

picket line while her place of employment was on strike.

e. *David Corey*

David Corey recalled attending a meeting on February 25, at approximatley 8 a.m., which was conducted by Bauer and Wright. According to this witness, during the meeting:

> . . . they went over the union constitution and they discussed and they told us the story of Sofie Coates and they said how she was fined. I asked Mr. Wright if the union didn't pay her back what she was fined and he said not to his knowledge.
>
> They also told us that we could be fined for crossing the picket line and we also be fined for talking against the union and we would have to appear in the union Office to pay the fine or be taken to court and fined an additional $500.
>
> They also told us that the company, if they went to the negotiation tables with the union, would start from scratch and throw everything out on the table and that in [sic] a result of that we could end up with less than we already have.
>
> Mr. Wright told us that the union could negotiate in the contract that we have to belong to the union to work at the company. I asked him if he could negotiate against the state law. He said that he would get back to me later with that.

f. *Sandy Corey*

Sandy Corey attended a meeting conducted by Bauer and Wright at 9 a.m. on February 25, 1980.[102] During this meeting:

> Jim Wright discussed bits and pieces of the URW constitution and he said that if an employee done something against the union that, and another employee knew about it, they both could be fined. He told us about Sofie Coates and how she crossed the picket line and how she was fined. He told us that if the union got in that everything would be thrown out on the table and we would negotiate from the bottom. He said that as a result of negotiations that we could end up with less. He said that the company would give us what they wanted us to have and what they could afford.
>
> Gordon Kinsland said that they would give the Texas & Alliance plant whatever we got.

g. *Max Burton*

This witness attended a meeting conducted by Bauer, Kinsland, and Wright on February 28, between 11:30 and 12 o'clock. At this meeting, according to Burton:

> Wright said that the company had a scheduled pay increase for January and for April and was not able to give it because of the union activities going on. They also said that there was a pay increase that the Union had filed charges against because they had given a pay increase during a union campaign. They[103] also when reviewed the union constitution. They said that if a person was in a bar and having a drink with another union member and this person said something false about a union officer that that person could be fined. And if the second person did not report this conversation that he could be fined also, then went on about if the union were to come into the plant, there would be a much more violent atmosphere. They said that—they mentioned strikes in other plants that had unions and that the violence that they had had. They said that all negotiations[104] would start at minimum wage and for everything that the employee gained in the negotiations that they would take something in return, for instance benefits, medical insurance, whatever.

h. *Dennis McFarland*

This employee attended the meetings the Company conducted about the Union and recalled a meeting where Wright discussed negotiations, stating, in response to a question about negotiations from "one woman:"

> There have been places where everything is thrown up on the table. And she says, "That really didn't answer my question." He went on and said, "What they do, they throw everything up on the table and they go from there and there's been places where we have started as flow [sic] as the minimum wage."

Wright did not specifically state that the Company was going to negotiate in this manner if the employees selected the Union as their representative at the McCook plant.

i. *Vicky Knight*

Knight attended a meeting conducted by Wright and Bauer at 10 a.m. on February 25, 1980. "Mr. Wright was telling us that during negotiations everything would be put out on the table and there was a possibility that we could loss some or all of our benefits and that we could end up with $3.10 an hour or minimum wage."

This witness also attended a meeting conducted by Wright and Kinsland on February 27, at 10 a.m., wherein Wright:

> . . . was talking about the Excelsior Springs contract. At one point, I am not sure how the conversation came up, but I think it was when they were talking about having no guarantees, he said there was a chance that EHR [Electric Hose and Rubber] may have to terminate our insurance in the future. Mr. Kinsland said that he would never agree to give any union cost of living adjustment [COLA] or a supplemental unemployment benefit clause.

[102] Her husband, David Corey, did not attend this meeting.

[103] The witness believed Kinsland was the individual who discussed the union constitution.

[104] Burton was sure it was Kinsland that stated negotiations were a give-and-take process.

The discussion of a COLA arose during an explanation of why the Waynesville plant was getting a raise of $1 an hour. Kinsland explained that the Company decided, during these times, to buy out the COLA provision in the Waynesville contract and he would never agree to either of these provisions "with inflation as it was."

j. *Doreen Parsons*

In late February, Parsons recalled attending a meeting held at or about 4:30 p.m. Present for the Company were Wright, Bauer, and Kinsland. Wright was discussing the Excelsior Springs contract when "Mr. Kinsland piped up and said that if the union got in that we would go to the bargaining table with nothing and for everything we got they would take something away and that it would be very possible for us to end up with a contract like Excelsior Springs."[105]

k. *Marty Cantrall*

As background, Marty Cantrall stated that during a company meeting conducted by Bauer and Torre on August 27, 1979, the Company's representatives discussed negotiations, that "they would wipe out our benefits and start over, each side taking one benefit and then giving up one benefit."[106] Bauer denies stating benefits would be taken away, but admitted stating that the Company would resist the Union by all lawful means.

l. *Clyde Swartz*

This current employee of Respondent attended a meeting conducted by Jim Wright and Bill Bauer on or about February 25. According to Swartz, during the meeting Wright was asked numerous questions. "Then he said, 'If the union gets in the negotiations will start from scratch.' And the benefits we had we would possibly lose." Swartz also attended a meeting on February 27, but his testimony did not contain any statements which were relevant to this section of the decision.

m. *Jacqueline Shepherd*

This employee attended two meetings dealing with the union contract about 1 week before the election. At the first meeting, Wright spoke on behalf of the Company.[107] Wright, according to this witness:

> . . . talked about the power of the URW president, he had total power. And then he went through the things such as fines if someone were to say or do something against the union they could be fined, and he explained who would be able to represent you in a case like that. And he went through things like strikes,[108] and the type of benefit you could expect to receive from the union.[109]

A few days later, she attended a second company meeting wherein Kinsland[110] was the main speaker, but Wright also discussed contract negotiations:

> . . . that they could be a quite lenghty affair, and he said that during negotiations there was a lot of give and take, mainly . . . and that he had been involved in some negotiations before at a prior plant he had worked at, and that you could not, if the union were to go in and say they wanted several things, that you could not always count on getting all of these things. You might get one, but you would have to possibly give up two of three.

n. *Cameron Martin*

Martin attended a meeting conducted on February 28 wherein Wright was going over the Excelsior Springs contract, and:

> . . . pointed out that it was a union shop, but they were making less than us.[111] And he was talking about negotiations and how that in order to get a benefit, they might take a little bit of wages, or to get more wages, they might take some benefits away from us. He said during negotiations that if they really wanted to make some negotiators cringe, they would throw in the rotating shift to keep the plant open all seven days.[112]

Wright passed around among the employees copies of the Excelsior Springs contract for the employees to examine during the meeting. Wright did not say how the

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[105] The witness recalled the names of about 16 coworkers who attended the same meeting, reflecting her ability to remember events.

[106] Counsel for the General Counsel, as previously stated, specifically declined to amend the complaint to include testimony about the August 27 meeting. As stated in *Pandair Freight, Inc.*, 253 NLRB 973, fn. 5 (1980):

> Evidence concerning a party's conduct prior to the 6-month 10(b) period is admissible as background evidence of the party's attitude toward its responsibilities and obligations under the Act and to clarify events within the 10(b) period. *Crystal Springs Shirt Corporation*, 229 NLRB 4 (1977); *Local 613, of the International Brotherhood of Electrical Workers, AFL-CIO (M.H.E. Contracting, Inc.)*, 227 NLRB 1954 (1977).

The same logic obtains to incidents full tried on this record where the evidence is specifically limited by the counsel for the General Counsel as background evidence and where, as here, Respondent is afforded a full opportunity to show surprise or other prejudice and fails to so demonstrate.

[107] Bauer was also present.

[108] As previously discussed, Nadia Schoup's supervisor, Rod Koetter, on or about February 8, told her "he would hate to see the union get in because we would all go out on strike and we could be replaced within 3 to 5 days. He later said 3 to 5 months."

[109] Doreen Trosper corroborated this testimony, asserting that Wright said they "would have to pay union dues, and that [at] first, when we were paying them we would have to pay so much in order to get into the union [initiation fees] and then every month they would set up how much we would have to pay after that." Douglas Winder and Nadia Schoup also testified that Wright, while discussing the Union's constitution, stated that fines and penalties could be imposed on employees. According to Lester Randolph, during one of these meetings, the company representative said they could not guarantee that the union "dues would remain at $5."

[110] Kinsland "talked mostly about Dayco economics."

[111] Mike Schoup and James Helberg, among others, corroborated this testimony.

[112] Mike Schoup, who attended a meeting on February 28, stated that at 3 or 4 a.m., Wright commented, "if you want to see a Union negotiator come off his chair, just mention a swing or rotating shift." It was indicated by Wright that the McCook plant could possibly have swing or rotating shifts if the Union became the employees' bargaining representative. Mark Prochazka testified that Wright, during a meeting held on February 25, mentioned that if the Union were voted in at the plant here that it was one of Dayco's policies to put in a swing shift.

employees at Respondent's plant would end up after negotiations.

o. *James Wright*

Wright recalled conducting approximately 13 meetings on February 25, 1980, where he presented, with the aid of a flip chart, excerpts from the union constitution. Some of these excerpts dealt with dues, strikes, and rules and fines. He recalled questions about strikes, one of which was whether employees would lose their benefits if they went out on strike. Wright stated he told the employees that during a strike at the Dover, New Jersey, plant the employees lost all their insurance while on strike but the employees had the option to pick up the insurance at their own expense, that there was some violence during this strike.

At another point in his testimony, Wright responded to another question about strikes, saying that Nebraska was a right-to-work State, and they would continue operating in the event of a strike. He also claims that in reply to another question, he stated that there was no law that the employees had to join a union. However, he did not claim to have explained how this would impact upon their insurance coverage during a strike or upon their liability for dues, fines, and penalties.

Wright was also present for a series of meetings conducted on February 27 and 28, 1980.[113] According to Wright:

> I told the employees that after a union election and the union won, that they would select a group of people who would come to the bargaining table. The company would select a group of people to represent them. I held up a contract and I said that every page, every pargaraph, every sentence, and every word was negotiated. This was a *Bible* by which both employees and employer had to live by. During this time that they would be negotiating the complete book and we had no idea how long it would take. The question came up as to how long the negotiations lasted and we said we have no idea. It can be from two weeks to two months to we don't know how long. We also explained to them or told them that during negotiations that all wages and benefits would be frozen. They would neither lose nor gain any benefits for this period of time. When they came to the table, that it was a give and take situation. That both company and union came in with a list of demands and each had a demand that they wanted to get in or something that they wanted to get in there would be a lot of trading. A lot of times the company would give up something in order to get something back from the union.
>
> There was a possibility, we explained, that they would not start at the level that they had right now. They did not start at their current rate and negotiate up. There is a possibility that the union could come in and say, "We want $7.00 and hour," the company could come back and say, "No, we will give you $3.10 an hour." And that's where you bargain. You start if from there. There was a possibility that when the contract was signed that they could come out with less benefits than they went into. We gave an example of our Compton, California, plant that was on strike at the time, because they lost a benefit when they went into negotiations.
>
> The only thing further that would have been said was someone asked a question in one of the meetings as to what they lost. We explained that going into negotiations their hospitalization was paid fully by the company and one of the demands the company had was that they pay their dependent coverage.

He admitted using the following terms: "we started with a clean slate," "it's an entirely different ball game," and he stated he could have used the term "we bargain from scratch." In further explanation of his speech to the employees, Wright stated:

> What I said was that in the meetings we would use one of these terms. There were thirteen meetings and we would use the term to emphasize a point with the employees that we did not start with what they had and negotiated from there. I used the example at this time that the union could come to the table with the $7 an hour demand and we could come back with a three dollar and something an hour, $3.10, offer. I also explained that during this time there was no wage or benefit change during the time of negotiations.

After being asked, on direct, if he ever said that the Company would bargain from scratch, he replied no. This apparent inconsistency with his prior testimony was not explained. It is concluded that he used the phrase "bargain from scratch" based upon this inconsistency and the demonstrated clarity of recall of the employees in their recitation of the content of the Company's speeches during the meetings.

Wright described his explanation of negotiations as follows:

> We said that the two parties would select representatives. There would be "X" number of people from the company "X" number of people from the union. They would go to the what we call the bargaining table and they would sit down and each would present a list of demands. Everything that was in the contract would be negotiated at that time or the contract would be the results of those negotiations.
>
> We stated that, again, during this time that there were no changes in wages or benefits. We stated that each party would, as I said these were negotiations, they would give something in order to get something. Once the negotiations were over and the contract signed, that it could be something less than what they went in with.
>
> I explained that the NLRB ruling was that we must negotiate in good faith with the union. It did not say anything that either side had to give and if

[113] Also present for the Company were Bauer and Kinsland.

> we should bargain to an impasse or we could not get together, we asked what the results the people would do or what action they would have when the negotiating committee came back and said this is what the company offered us and this is all we could get. We asked them and they say we accept it or we would strike it.

Wright denied making the following statements: saying during negotiations the Company and Union would take turns taking things away from employees; saying that during negotiations each side would take things away until there was nothing left; saying that, if the Union came in, the Company would start negotiating at the minimum wage; saying that if the Union came in wages and benefits would be reduced to the minimum and that negotiations would start from there;[114] and saying that employees could lose wages and benefits because the Company would start negotiating from scratch.

The contract with the AVSCO plant in Excelsior Springs, Missouri, was explained to the employees, comparing the number of holidays, and shift premium with the McCook plant. The AVSCO contract had a swing shift operation provision which gave rise to questions. One was answered by Kinsland as follows:

> . . . that it was something that a company would negotiate for the right to install one because it would give you the opportunity to run your machinery for 25 per cent more time, 25 percent more use out of your present equipment and not have to buy new equipment.

Wright denied telling the employees that it was Dayco policy to have contracts contain provisions for swing shifts:

> I stated that usually a company would put that in their demands when they go to the bargaining table because it gives them the freedom to install one at a later date. If they don't need it now, they have the right to install one. I said a company, I did not specify DAYCO, but I said a company would usually ask for one.

Wright also pointed out that another contract discussed had a union-security clause. There is no indication that he explained that Nebraska was a right-to-work State and what impact that would have upon a union-security clause.

According to Wright, he also compared the AVSCO contract to one the Company had negotiated at Waynesville, which he explained was the result of many years of bargaining and indicated that the McCook plant would wind up with an Excelsior Springs contract or even a Waynesville type contract. The comparison Wright made was with a Dayco affiliate, Allen Industries, which had a plant in Compton, California. The Compton plant had a strike because the employees lost a benefit through negotiations. The Compton plant was not claimed to be represented by the same union as is involved in this proceeding and was not engaged in the same manufacturing areas, although its products are used by the automotive industry. Wright did not know if other benefits granted in the contract offset the loss of insurance payments for dependents.

When asked if he opined how long negotiations would take, he stated he informed the employees it could take anywhere from 2 weeks to 2 months and, although he does not recall so stating, it was within the realm of possibility that he said it could take 2 years.

Wright recalled telling the employees about the Sofie Coates case, that she was fined an excessive amount of money by the union for crossing the picket line.[115] He does not remember telling the employees she got her money back. He could not recall what the pamphlet the employees were given said. The number of pamphlets circulated to the employees and the opportunity the employees were afforded to review the pamphlets was not placed into evidence. Therefore, any allegation relating to the contents of the pamphlets is considered not probative of any of the issues.

Kinsland substantiated Wright's testimony about his explanation of the process of negotiations mentioning, in addition, that Wright discussed a management-rights clause contained in the Excelsior Springs contract. Bauer did not testify about these meetings.

Discussions

As previously indicated, the Act permits an employer to express views, arguments, or opinions only if such expressions do not contain threats of reprisal. The threats of economic benefits are among "potent and sinister that can be leveled against employees, robbing them, through fear, of the Act's intended assurance of freedom of choice relative to whether to bargain collectively"; and that, accordingly, "such expressions by an employer to dependent employees seeking to exercise rights under the Act, particularly in a prestatutory election atmosphere, are violative of Section 8(a)(1) of the Act." See *South Hills Health System*, 240 NLRB 69 (1979), citing *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617–620; *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405, 409–410 (1964); *Henry I. Siegel Co., Inc.* v. *N.L.R.B.*, 417 F.2d 1206, 1208, 1214 (6th Cir. 1969), cert. denied 398 U.S. 959 (1970); *N.L.R.B.* v. *E. S. Kingsford Motor Car Co.*, 313 F.2d 826, 832 (6th Cir. 1963), and cases cited; *N.L.R.B.* v. *Federbush Company, Inc.*, 121 F.2d 954, 957 (2d Cir. 1941); *Components, Inc.*, 197 NLRB 163 (1972); *Wigman Mills, Inc.*, 149 NLRB 1601, 1611, 1618 (1964), enfd. 351 F.2d 591 (7th Cir. 1965). The Employer's statement will be examined under these criteria.

It is unrefuted that Wright, in his speech, clearly indicated that the Company would continued to grant the same benefits at McCook and Alliance, Nebraska, and the Olney, Texas, plants,[116] irrespective of the poetential

[114] How making this statement differed from Wright's admission that he gave as an example of negotiations that the Company could counter a union wage demand with an offer of $310 which was then prevailing minimum wage, was not clarified.

[115] The exact amount of the fine was not mentioned.

[116] And once the Ocala, Florida, plant became operational, it would also be included in this grouping.

unionization of the McCook plant. This statement, particularly in light of the Company's campaign to defeat the Union which, as found herein, contained unlawful as well as lawful, tactics, clearly conveyed that union representation for the McCook employees would be a futility for in no event would union representation result in any different conditions than the other named plants, whose employees were not represented by a union. *American Telecommunications Corporation, Electromechanical Division, supra.*

That the Respondent had previously established a policy of granting uniform benefits to these plants does not alter the finding of an 8(a)(1) violation where, as here, it informs the employees that it wil maintain this policy of granting the same benefits with or without the Union. *American Telecommunications, supra,* citing *Casey Manufacturing Co., supra; Dixisteel Buildings, Inc., supra; Montgomery Ward & Co., Inc., supra; GTE Sylvania Incorporated supra; South Shore Hospital,* 229 NLRB 363 (1977), reversed in part and affd. in part 571 F.2d 677 (1st Cir. 1978).

Consequently, by stating in effect that Respondent would not grant unionized employees more than it was willing to give to its unrepresented employees, Respondent was coercing its employees to reject the Union in violation of Section 8(a)(1) of the Act.

As found in *American Telecommunications, supra,* the comparisons of the Excelsior Springs contract and the discussion of the Compton, California, striker which were the results of the negotiating process which allegedly concluded in agreement that gave up precontract benefits,[117] without demonstrating the accuracy of these results, is also violative of Section 8(a)(1) of the Act.

The employees' testimony that Wright stated that, if the Union won the election, the Company would start from scratch is unrefuted. Wright admitted that he may have said they would start from scratch and admitted saying "we started with a clean slate" and "it's an entirety different ball game." Additionally, he admitted giving as an example company counteroffers on wages of the minimum wage.

Also, as Burton and Sabin and many others testified,[118] in relation to starting from scratch,[119] or at the minimum wage,[120] references in the explanation of the negotiating process, the Company clearly indicated that the employees had to be willing to give up existent benefits. To buttress this impression then, Wright stated that he would probably be the negotiator, and the Company negotiates tough. Cantrall's unrefuted background testimony supports the finding that the employees' testimony regarding these threats of loss of benefits was a longstanding part of the Company's antiunion campaign.

Statements to employees by employers during a union organizing campaign that negotiations "start from scratch, " "we start with a clean slate," or "it's an entirely different ball game," are coercive "within the proscription of Section 8(a)(1) and interfere with the employees' ability to exercise a free choice in the election, particularly where, as here, such statements are made in the context of other cocercive remarks." *Dominican Santa Cruz Hospital,* 242 NLRB 1107 (1979), citing *Interstate Engineering, a Division of A-T-O, Inc.,* 230 NLRB 1 (1977); *York Division, Borg-Warner Corporation,* 229 NLRB 1149, 1153-54 (1977), and cases cited herein.

In addition to stating that the Company would "negotiate tough," it is found that Cameron Martin's testimony is credible to the effect Wright also said, after stating that the employees at Excelsior Springs who were represented by a union, received less benefits than Respondent gave its employees, and during negotiations, "they might take some benefits away from us," that if, during negotiations, you really warnted to make negotiators cringe, they would throw in a swing shift, thereby threatening implication of more onerous working conditions in the event the employees voted for the Union. Wright and Kinsland admitted discussing the swing shift in the Excelsior Springs contract and indicated that the Company would bargain for one in the forthcoming negotiations to maintain its options.[121] Furthermore, Respondent indicated that bargaining could take as long as 2 years, during which time they would not grant an increase in wages or benefits because of the Union. Sandy Corey's testimony that on February 26, Jim Wright told her that there was no way the Company would give the employees 6.50 an hour, that if the Union did get in he could beat it in any court or arbitration, is credited based on her demeanor and demonstrated ability to recall facts.

Respondent argues, correctly, that it is permissible to inform employees of the realities of collective bargaining, including the possibility that their repesentatives may trade away some existing benefits in order to secure other benefits. However, in the case of the "bargaining from scratch" statement, it was accompanied by pronouncements that the Company would be tough in negotiations that could take up to 2 years,[122] that negotiations could be long and hard, that it would ask for certain provisions[123] and would never agree to others,[124] which demonstrates the risk of loss of benefits, not through the give and take of good-faith bargaining, but from the predetermined aggressive bargaining posture of the employer.[125] This conclusion is bolstered by the prior finding that the Employer's statement regarding giving McCook the same benefits as several other plants demonstrating that electing union representation is a futility are statements indicating that selecting a bargaining representative will result only in a negotiation charade, thereby coercing employees in their Section 7 right to select a bargaining representative in violation of Section 8(a)(1) of the Act. These statements, *a fortiori,* also interfere with the employees' exercise of an untrammeled choice in the election. *Curtin Matheson Scientific, Inc.,*

[117] For example, inferring that the employees would have to pay for dependents' health insurance.

[118] The employees' testimony is credited based on demeanor and for the reasons stated hereinbefore.

[119] Sabin.

[120] Burton, McFarland, Vicky Knight, Parsons, Cantrall, and Swartz.

[121] The Company also stated they wanted a management-rights clause.

[122] See *Madison Kipp Company,* 240 NLRB 879 (1979).

[123] Swing shifts and management-rights clause.

[124] Cost-of-living allowance and supplemental benefits clause.

[125] See *Tufts Brothers, Incorporated,* 235 NLRB 808 (1978).

228 NLRB 996 (1977); *Dominican Santa Cruz Hospital, supra.*

Other expressions the Employer utilized are: that union representation would subject employees to large fines and penalties, strikes with the potential of violence, while not normally considered campaign propaganda of such a nature as to warrant a finding of a violation, when these statements were placed with the background of the surrounding factors,[126] create an atmosphere of such severe economic threats as to induce fear that support for the Union and unionization would result in severe economic loss. When all the Respondent's statements are considered, they raise such a fear of economic threat as to be considered unlawful. See *N.L.R.B.* v. *Exchange Parts Company*, 373 U.S. 405; *Plastronics, Inc.*, 233 NLRB 155 (1977); *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977); *Peterson Builders, Inc.*, 215 NLRB 161 (1974); *Saunders Leasing System, Inc.*, 204 NLRB 448, 454–455 (1973), enfd. in relevant part 497 F.2d 453 (8th Cir. 1974).

That Wright also stated the parties are obligated by the National Labor Relations Act to bargain in good faith is not a sufficient disclaimer as to negate the fears of plant closure, job loss, frozen or reduced wages, and other consequences of bargaining such as strikes,[127] considering shifting some work from the Waynesville plant, which is unionized to the not unionized Ocala, Florida, plant, generated by these statements which preceded, accompanied, and followed this disclaimer; and does not insulate the Company from responsibility for the coercive effect of its campaign statement. Accordingly, it is concluded that the statements were violative of Section 8(a)(1) of the Act.

10. Objections to election

The parties stipulated that the critical period of conduct that allegedly destroyed the laboratory conditions necessary for a fair election was approximately February 1 through March 6, 1980.

In addition to other previously discussed allegations,[128] the Charging Party claimed that Willie Welsh, an admitted supervisor, was "stationed" within 10 to 15 feet of the entrance to the voting area.[129] Respondent argues that was in a section of the plant that was encompassed within his area of responsibility. Welsh did not testify to explain his presence near the polling site during the voting. The proximity of the location to his general work area does not, standing alone, legitimatize his presence during the voting. Without any explanation for a supervisor to be "stationed" outside the voting area, it can only be concluded that his purpose in observing the even was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched. This conduct is found to have destroyed the laboratory conditions necessary for the conduct of a free and fair election. See *Ravenswood Electronics Corporation*, 232 NLRB 609 (1977); *Shrewsbury Nursing Home, Inc.*, 227 NLRB 47 (1976); and *Woodland Molded Plastics Corp.*, 250 NLRB 169 (1980).

Doreen Sabin, while serving as a union observer during the March 6, 1980, election, saw Daryl Brown, a supervisor, walk past the voting polls, without stopping, glance in while walking, and saying nothing. The Board agent investigated the incident at the time it occurred. Walking past the polling area without stopping, cannot, standing alone, be construed as employer surveillance.

O'Dea also served as an observer for the Union during the March 6 election. According to his undisputed testimony, when the employees came from their work stations to the voting area, they had to walk past the quality control area and they also had, to pass an area where either Supervisor Young or Supervisor Sitzman was standing.[130] Young did not testify and Sitzman did not explain his presence. Accordingly, as in the case of Welsh, the unexplained presence of these supervisors at points the employees had to pass in order to vote is found to be coercive evidence of such a nature as to have destroyed the laboratory conditions necessary for the conduct of a free and fair election.

Additionally, O'Dea gave uncontroverted testimony that, after the voting was completed, O'Dea passed the quality control office[131] and Ken Parmley,[132] said, "Leonard, is the voting all over?" O'Dea said yes, to which Parmley gave the following rejoinder: "Good, I guess I can leave now—I do not know why they wanted me here—they told me to stay here until the voting was over." Parmley did not testify; no reason was given for him absence. O'Dea's unrefuted testimony fails to establish that Parmley was so stationed as to be clearly visible to the employees as they passed to and from the polling site.[133] Furthermore, since Parmley was regularly assigned to quality control, his assignment to that office during the voting was not shown to be unusual or not for legitimate business purpose such as preventing the voting process from becoming unduly disruptive.

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[126] For example, the threats of layoffs, plant closures, and the withholding of wage increases.

[127] For example, stating that if the Union got in there was an expectation of strike, increased violence, and the possibility of McCook being turned into a slum.

[128] The Charging Party asserted that the insurance programs were a major bone of contention and one of the employees' chief areas of complaint, and by increasing the coverage of the major medical program and changing insurance companies, the Company instituted benefits during the "critical" organizing period which unduly influenced the employees in the election. This change in benefits has previously been discussed in section 6, above. Pension benefits also increased substantially during this time.

[129] This testimony by Nadia Schoup was uncontroverted.

[130] The Charging Party tried to establish through O'Dea's testimony that the quality control technicians had supervisory or other status warranting a finding that their ability to view employees going to the polls had a coercive effect. The evidence of record fails to establish that the quality control operators held supervisory or other status to warrant finding that their presence at their work stations, without blocking view of the employees walking to the polls, was coercive or intimidating.

[131] This office is located about 15 feet from the office selected as the polling site.

[132] O'Dea believed Parmley was the assistant quality control supervisor. This belief was not refuted.

[133] The windows to the quality control foreman's office were taped over. There was no showing that there was any need for taping over the windows of the area the nonsupervisory quality control employees occupied, or that such a request, meritorious or not, was ever made.

The office used for the election was previously used for a similar purpose in 1977. In 1977, all the furniture was removed prior to the election. In 1980, the furniture was not removed. There was no showing that the selection of the same site in 1980 was designed to be coercive or otherwise destructive of the necessary conditions to ensure a free and fair election, and the same holds true regarding the failure to remove the office funiture. The presence of funiture was not shown to have impaired the voting. Respondent's assertion that the site was utilized differently in 1980 than in 1977 resulting in the different appearance in 1980 is unrefuted.

Another objection, discussed previously as background evidence, was based upon two conversations testified to by Burton. The first conversation occurred on February 28 when his supervisor, Gary Pevoteaux, inquired about the union campaign in the presence of co-worker Rod Cluff.[134] The conversation occurred at Pevoteaux's[135] desk, and he opened the conversation by asking what "they [Burton and Cluff] thought of the meeting, if it had changed any of their minds about anything . . . [After they replied] then he asked Cluff how he was going to vote and Cluff replied by saying he was going to vote no." No valid purpose for the question has been postulated.

This unrefuted testimony of a clearly unlawful interrogation[136] by a supervisor is found to have adversely impacted on the free choice of unit members. Furthermore, this was not an isolated instance, for Respondent admitted making inquires of D. Winder and D. McFarland "what they thought" of the February 25 meetings.

Another matter which was raised as an objection was the establishment of employee suggestion committees. On February 8, 1980, Dick Jacob, president of Dayco, sent a Telex message to each of Respondent's plant managers demanding, in light of the Company's prior economic condition, "justification for the existence of five electrical hose plants." Bauer testified that on February 11, in response to this missive, he held an employee meeting and read Jacob's Telex to the assemblage. Assertedly to comply with Jacob's directive to "take action," Bauer informed the employees that they will be formed into five committees[137] review suggested improvements to management. Management made cash awards[138] at periodic employee meetings.

This system of processing employees' suggestions was eliminated in July 1980, when the McCook plant implemented the system utilized by Dayco, which resulted in the elimination of the employee committees, but retention of the management team which continued to evaluate the suggestions and make monetary awards.[139] Under the new system, the amount of the monetary awards increased substantially.

The initiation of a suggestion program less than a month before the election, accompanied by an awards program, when considered in conjunction with the threat of plant closure, layoffs, solicitation of grievances, the other promises of benefits, the threat, and actual withholding of wage increases, as well as the other matters discussed hereinbefore, is coercive and interfered with the conduct of a fair election. *Multi-National Food Service*, 238 NLRB 1031 (1979).

Finally, the Petitioner asserts that a full-page advertisement placed by Respondent and appearing on March 5, 1980, in the McCook Daily Gazette is objectionable. Consistent with its theme over the term of the campaign, the Company stated in the advestisement that

> The Union has done nothing to keep jobs in those plants.[140] We have never had a layoff in McCook, but over 400 people are out of work at Waynesville. . . . On top of that, the Waynesville and Springfield plants make V-belts. In McCook, we make hose. There is a difference—a big difference. Goodyear had a URW hose plant in North Chicago, Illinois. That plant was moved to Norfolk, Nebraska, and 400 Goodyear employees lost their jobs in North Chicago. Goodyear said they couldn't compete in North Chicago paying the kind of wages the URW was demanding. When Goodyear closed the North Chicago plant, they were quoted as saying: "Hose business is more competitive and not as profitable as other rubber operations."

The publication further stated:

> Our sales are not good. The nation-wide recession has hit Electric Hose hard. There could be no worse time to bring a union into our plant.
>
> What our plant needs is more business. It doesn't need the URW. Unions don't create a team atmosphere. They don't shop hose. And they certainly don't bring in any new orders.
>
> If the URW came into McCook, we could have a strike. It could be a long and bitter strike. Strikes sometimes mean violence—not to mention hard times for strikers who aren't bringing home a paycheck.
>
> People who go out on strike may be permanently replaced. That means that you might not have a job to come back to once the strike is over. This has happened at many other plants. We would hate to see it happen here in McCook.
>
> Strikes can tear a small community to pieces. People take sides in a strike and friend can turn against friend. Living in McCook might never be the same again.
>
> We want to continue to work with you to make Electric Hose in McCook a better plant. We don't need the union to come between us. There is too much at stake to let that happen.

[134] Cluff did not testify. His absence was unexplained.

[135] As previously indicated, failure to call Pevoteaux as a witness was unexplained.

[136] General Counsel specified that this testimony goes only to the objections phase of the proceeding, and is not alleged to be a violation of Sec. 8(a)(1).

[137] The committees were space utilization, waste, housekeeping, scrap, and mechanical downtime.

[138] The awards ranged between $5 and $25.

[139] The first awards under the new program were announced approximately 3 months prior to the hearing herein, or around the first of July.

[140] Springfield, Missouri, and Waynesville, North Carolina, two affiliates, whose employees are represented by the Union.

The published statement then urges the employees to vote no in the election. Again the employer raised the specter of layoffs, plant closure, lost wages and benefits, loss of cooperation between management and employees included in the unit, violence, and strikes. Not only does the advertisement graphically illustrate the overall campaign strategy of the employer to create a coercive atmosphere by stating that unionization would result in strikes, layoffs and other aforementioned adverse consequences, but it also supports the previsouly related testimony of the employees regarding the various threats and other coercive statements made to them by various company representatives.

Summary

In sum, the Employer, from the outset of its campaign, repeatedly utilized the carrot-and-stick approach, employing potential layoffs and plant closings, in conjunction with the union campaign and the opening of the Ocala plant which was nonunion, indicating that bargaining would be futile, announcing that no wage increases or other improvements in benefits would be granted during the campaign and negotiations even though negotiations may last years, and other adverse consequences, would flow from unionization. Accordingly, it is concluded that the Company's overall campaign, and particuarly those events occuring after February 1, 1980, created a coercive atmosphere, and merit is found in Petitioner's objections. Therefore, it is recommended that the election be set aside.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the conduct found violative in section III hereof, Respondent interfered with, restrained, coerced its employees in the exercise of their rights as guaranteed them by Section 7 of the Act, thereby engaged in, and is engaging in, unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not alleged in the other unfair labor practices alleged in the consolidated complaint here under consideration.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action designed to effectuate the purpose of the Act.

Having found that Respondent terminated "early-in overtime" and withheld a wage increase at the McCook facility in violation of Section 8(a)(1) of the Act, I shall order Respondent to make the McCook employees whole by paying them the amount they would have received if the "early-in overtime" had been retained and the wage increase had been given at the usual interval, with interest, paid in accordance with the policy of the Board set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[141]

I further recommend that the allegations of the complaint that were not proved be dismissed.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[142]

The Respondent, Electric Hose and Rubber, McCook, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees regarding their union activities and sympathies and the union activities and sympathies of fellow employees.

(b) Threatening employees with layoffs, plant closure, and other economic reprisals if they select the Union as their collective-bargaining representative.

(c) Withholding, or telling its employees it is withholding, scheduled annual wage increases because of the union organizing campaign and, during the pendency of the negotiations, if the Union is selected as their collective-bargaining representative.

(d) Unlawfully informing employees that they could not transfer to the Ocala, Florida, plant because they supported the Union.

(e) Unlawfully soliciting employees to withdraw their union authorization cards.

(f) Soliciting grievances from employees and promising them benefits to discourage their union activities and support.

(g) Promulgating and discriminatorily enforcing a rule which prohibits employees from displaying prounion material in or around their work stations, and reprimanding and threatening to reprimand them for violations thereof.

(h) Announcing to employees the futility of selecting the Union as their collective-bargaining representative and conveying to them the impression that union representation is inevitably accompanied by uncompetitiveness, loss of business, loss of jobs and other dire consequences.

(i) Unlawfully discontinuing "early-in overtime."

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in the Act.[143]

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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[141] See also *Olympic Medical Corporation*, 250 NLRB 146 (1980), and see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[142] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[143] It is found that Respondent's conduct is so egregious and widespread a to warrant the issuance of a broad order. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979); *Pedro's Inc., d/b/a Pedro's Restaurant*, 246 NLRB 567 (1979), and *Southern Moldings, Inc.*, 255 NLRB 839 (1981).

(a) Make whole any employees who suffered loss of pay resulting from the unlawful discontinuance of "early-in overtime" and the delay in granting regularly scheduled wage increases.

(b) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for the determination of the amount owing under the terms of this Order.

(c) Post at its McCook, Nebraska, facilities copies of the attached notice marked "Appendix."[144] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent's to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election of March 6, 1980, be set aside and a new election directed.

[144] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."